(1)

No. 93-5131-CSY
Status: GRANTED
CAPITAL CASE

Title: Paul Palalaua Tuilaepa, Petitioner
v.
California

Docketed:
July 8, 1993

Court: Supreme Court of California

Counsel for petitioner: Gillingham,Howard

See also:
92-8482
93-5019
93-5140
93-5161

Counsel for respondent: Prahl,Wm. George.

Entry	Date	Note	Proceedings and Orders
1	Jun 1 1993	G	Application (A92-898) to extend the time to file a petition for a writ of certiorari from June 8, 1993 to July 23, 1993, submitted to Justice O'Connor.
2	Jun 2 1993		Application (A92-898) granted by Justice O'Connor extending the time to file until July 8, 1993.
3	Jul 8 1993	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
6	Aug 6 1993		Order extending time to file response to petition until September 7, 1993.
7	Sep 3 1993		Brief of respondent California in opposition filed.
8	Sep 9 1993		DISTRIBUTED. September 27, 1993
10	Oct 4 1993		REDISTRIBUTED. October 8, 1993
11	Oct 6 1993	X	Supplemental brief of petitioner filed.
12	Nov 1 1993		Supplemental brief of respondent filed.
13	Nov 10 1993		REDISTRIBUTED. November 24, 1993 (Page 28)
14	Nov 18 1993		REDISTRIBUTED. November 24, 1993 (Page 28)
16	Nov 29 1993		REDISTRIBUTED. December 3, 1993 (Page 16)
18	Dec 6 1993		Petition GRANTED. limited to Quesiton 2 presented by the petition. The case is consolidated with No. 93-5161, Proctor v. California, and a total of ninety minutes is allotted for oral argument. **********
19	Dec 17 1993	G	Motion of petitioner for appointment of counsel filed.
20	Dec 22 1993		Record filed.
		*	Original proceedings Supreme Court of California (BOX).
21	Dec 29 1993		REDISTRIBUTED. January 7, 1994. (Page 42)
22	Jan 10 1994		Motion for appointment of counsel GRANTED and it is ordered that Howard Gillingham, Esquire, of North Hollywood, California, is appointed to serve as counsel for the petitioner in this case.
23	Jan 19 1994		Joint appendix filed.
24	Jan 24 1994		Brief amici curiae of American Civil Liberties Union, et al. filed.
25	Jan 24 1994		LODGING consisting of two spiral binders containing transcripts of penalty phase proceedings of capital trials received from counsel for amici curiae ACLU, et al.
26	Jan 24 1994		Brief amicus curiae of California Appellate Project filed. VIDED.
27	Jan 27 1994		Brief of petitioner Paul Palalaua Tuilaepa filed.

2pp

No. 93-5131-CSY

Entry	Date	Note	Proceedings and Orders
28	Feb 2 1994		SET FOR ARGUMENT TUESDAY, MARCH 22, 1994. (3RD CASE).
29	Feb 14 1994	G	Application (A93-680) to file a consolidated brief on the merits in excess of page limits, submitted to Justice O'Connor.
30	Feb 15 1994		Application (A93-680) granted by Justice O'Connor, allowing a maximum of 75 pages.
31	Feb 15 1994		CIRCULATED.
32	Feb 22 1994	X	Brief amicus curiae of Criminal Justice Legal Foundation filed. VIDED.
33	Feb 25 1994	X	Brief of respondent California filed. VIDED.
34	Mar 11 1994	X	Reply brief of petitioner Paul Tuilaepa filed.
35	Mar 22 1994		ARGUED.

No. _____ (2) ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

PAUL PALALAUA TUILAEPA,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

93-5131

Supreme Court, U.S.
F I L E D
7-8- 1993
OFFICE OF THE CLERK

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

The petitioner, PAUL PALALAUA TUILAEPA, requests leave to file the accompanying petition for writ of certiorari, without prepayment of costs and to proceed in forma pauperis. Petitioner has been granted leave to so proceed before the California Supreme Court. Petitioner's affidavit in support of this motion is attached hereto.

Dated: 7/6/93

Respectfully submitted,

Howard W. Gillingham
4370 Tujunga Avenue
Suite 105
North Hollywood, CA 91604

Counsel for Petitioner

51 pp

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

PAUL PALALAUA TUILAEPA

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

93-5131

AFFIDAVIT IN SUPPORT OF MOTION

FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, PAUL PALALAUA TUILAEPA, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security thereof, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security thereof, and that I believe I am entitled to redress.

I further swear that the statements that I have made below relating to my ability to pay the cost of proceeding in this Court are true:

1. I am presently incarcerated in the California State Prison at San Quentin and have been continually so incarcerated since 1987.

2. I do not recall my last employment or the date, but it was over ten years ago, because I was incarcerated in the California Youth Authority for several years before the incarceration in San Quentin.

3. I have not received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

4. I have $_____ total in my prison accounts. I have no other funds.

5. I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property.

6. There are no persons who are dependant upon me for support.

7. I have been indigent throughout my case in the trial and appellate courts, having appointed counsel at every level.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties of perjury.

_____ _____

Date Paul Palalaua Tuilaepa

CERTIFICATE

I hereby certify that the petitioner, Paul Palalaua Tuilaepa, has the sum of $.54 on account to his credit at San Quentin State Prison, where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said institution:

NONE

Dated: June 8, 1993

Authorized Officer of the
San Quentin State Prison,
Tamal, California

No. _____

(Application # A898)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

PAUL PALALAUA TUILAEPA, Petitioner,

v.

THE STATE OF CALIFORNIA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF CALIFORNIA

RECEIVED
JUL 8 1993
OFFICE OF THE CLERK
SUPREME COURT, U.S.

HOWARD W. GILLINGHAM
4370 Tujunga Avenue
Suite 105
North Hollywood, California 91604
(818) 763-4775
[Fax (818) 763-5822]

Lawyer for Petitioner

QUESTIONS PRESENTED

I

Where the California court affirmed the death judgment by relying on facts outside the record and without affording petitioner an opportunity to confront and brief the points, does petitioner's death judgment violate due process and result in an arbitrary and capricious death judgment?

II

Is California's death penalty statute vague as written and applied in violation of Stringer v. Black and the 8th Amendment?

III

Is petitioner's death judgment constitutionally invalid because he was tried from beginning to end in shackles, with no manifest need?

IV

Did trial counsel's shocking representation in failing to protect petitioner from standing trial violate petitioner's constitutional right to counsel?

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Shackling: A Refresher on Courtroom Security
Forum, California Attorneys for Criminal Justice
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No. _____

(Application #A898)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

PAUL PALALAUA TUILAEPA, Petitioner,

v.

THE STATE OF CALIFORNIA, Respondent.

PETITION

Petitioner, Paul Palalaua Tuilaepa (pronounced Two-ee-lay-pa), respectfully prays that a writ of certiorari issue to review the judgment of the California Supreme Court entered on December 28, 1992 and final on March 10, 1993.

JUDGMENT BELOW

The opinion of the California Supreme Court in People v. Tuilaepa (1992) 4 C4th 569, 15 CR2d 382, 842 P2d 1142, denying petitioner's request for relief, is included as Appendix A to this petition.

JURISDICTION

The jurisdiction of this Court is involved pursuant to 28 USC 1257.

The order below was entered on March 10, 1993.

CONSTITUTIONAL PROVISIONS INVOLVED

The due process clause of the 5th Amendment:

> "No person shall . . . be deprived of life, liberty or property without due process of law;"

The impartial jury and assistance of counsel clause of the 6th Amendment:

> "In all criminal prosecution, the accused shall enjoy the right to speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to have the assistance of counsel for his defense."

The cruel and unusual punishment clause of the 8th Amendment:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The incorporation clause of the 14th Amendment, Section 1:

> ". . . nor shall any state deprive a person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

In 1987, petitioner was convicted of murder during the course of a robbery which, in California, is a "special circumstance" decided at the guilt phase making petitioner eligible for death

penalty consideration. (California Penal Code section 190.2(a)(17)(i) (hereinafter "CPC"))

A penalty phase was conducted and the jury returned a verdict of death. (CPC 190.3)

Pursuant to California court guidelines, while the fully briefed appeal was pending, a writ of habeas corpus was filed on July 6, 1992. That writ has not been acted upon.

SUMMARY STATEMENT OF FACTS

A. Re: The Crime

Petitioner and an accomplice robbed a crowded bar. One robber was armed. One bar patron was shot and killed and several others were wounded as the robbers left the bar.

B. Re: The Questions

Question I

On the critical issue of petitioner's shackling, the California Supreme Court decided the issue against petitioner relying on facts outside the record. The court relied upon the content of declarations which were exhibits to the prosecution's response to the habeas corpus petition, and they were not properly before the court. The unfairness is trebled because petitioner's counsel had tried to augment the record on appeal on the shackling issue only to be rebuffed with ". . . all of defendant's post trial

efforts to create a record on this issue were unauthorized and incompetent." (Appendix A:18)[1]

Question II:

Pursuant to CPC 190.3, the penalty jury was given evidence of so called "other violent criminal activity" to weigh with all other evidence, but with no guidance save for the instruction telling them that before they could consider such evidence they must believe beyond a reasonable doubt that the defendant did the acts. No guidance was given as to how to decide the criminality of those acts.

Question III:

Petitioner was restrained in full view of the jury throughout the trial. He was always chained by the ankles, and sometimes he was also handcuffed by the wrists. The trial court conducted no hearing, nor made any findings of manifest necessity for the restraints, nor gave any consideration to less onerous alternatives. The California Supreme Court's affirmance was silent on the absence of these important prerequisites.

[1]Chastising counsel the court wrote, "[D]efendant is entitled to an appellate record that accurately reflects what was done and said in the trial court -- not what he wishes had been done or said." (Appendix A:18)

Question IV:

Trial counsel did not object to the shackling. He likewise was silent. He did nothing.

DISPOSITION OF THE ISSUES BELOW

The question of the case being decided based upon facts outside the record and without the opportunity for petitioner to contest and brief was raised as soon as it occurred. The first sign of this arbitrary and abnormal procedure was in the court's opinion issued on December 28, 1992. Petitioner responded to the issue and challenged this unprecedented procedure in a petition for rehearing and motion to recuse the court. Both were denied.

The issue under Stringer v. Black (1992) 503 US __, 117 LE2d 367, was raised in the briefing and was decided in the court's appellate opinion. (Appendix A:33-36; also see concurring opinions pp. 2-7)

The shackling issue was raised in the briefing and decided against the petitioner in the appellate opinion. (Appendix A:11-18)

Ineffectiveness of counsel was raised in the briefing and is discussed in only one paragraph of the opinion. (Appendix A:14-15)

REASONS FOR GRANTING THE WRIT

I.

The California Court affirmed the death judgment by relying on facts outside the record and without affording petitioner an opportunity to confront and brief the points; therefore petitioner's death judgment violates due process and resulted in an arbitrary and capricious death judgment

Physically restraining a defendant is of course condemned by this court except as a "last resort." (Illinois v. Allen (1970) 397 US 337, 344) This is so, not simply because of the prejudice to the defendant in front of the jury, but because of the "affront to the very dignity and decorum of judicial proceedings." (Id. at 344) Because trial counsel was asleep at the wheel and made no record of the shackling[2] or the jury's ability to view the restraints, appellate counsel moved post-trial to augment the record.[3] As noted, appellate counsel's effort to augment the record was ridiculed by the court, calling it "unauthorized and incompetent." (Appendix A:18) At that hearing it had been conceded by the trial participants that petitioner was shackled in some way, at all times. There was disagreement as to whether or not the jury could, or did, see the chaining.

---

[2]Not even the fact of its occurrence was noted.

[3]Prior to the post-trial hearing one year after the trial, the only record of shackling was discovered by a combination of experience, instinct and inference. The single reference was during jury selection when the trial judge instructed petitioner as follows: "Would you stand up, Mr. Tuilaepa, so they can see you. Do you want to turn around, if you can, and let them look at you." (RT 2:337)

While the appeal was pending and before argument, the required simultaneous habeas corpus petition was filed and opposed. Petitioner included two juror declarations in his pleading, and respondent included two subsequent declarations by the same jurors. The declarations attached as exhibits to the petition were made 3-1/2 years closer to the time of the trial.[4]

Petitioner moved in the appeal to have the court take judicial notice of those declarations he had obtained. (Petitioner had asked respondent if, in fairness, respondent wanted to include in the request for judicial notice the declarations he had attached as exhibits to his response. He chose not to include them nor to join in the judicial notice request.) The court refused to take judicial notice of petitioner's declarations but, incredibly relied upon statements in respondent's declarations which were neither before the court nor the subject of a judicial notice request. In fact the respondent did not want then before the court in the appeal. (Appendix A:7,n.4)

As to whether there was any justification or manifest need for the shackling, likewise the court reached into the response, ignoring the petition and trial counsel's declaration attached there, and this time quoted trial counsel's self-serving declaration in the response. (Over five years after the trial,

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[4]Trial in this matter was in August, 1987. The post-trial hearing in which petitioner thought he was augmenting the record was October, 1988, and the two juror declarations attached to the habeas corpus petition were dated January, 1989. The two juror declarations attached to the respondent's habeas response were signed September and October, 1992.

counsel said, "[D]efendant was thought to be dangerous and a flight risk during trial because he and his brother who was in attendance were gang members."[5] (Appendix A:12)

Petitioner had no opportunity to confront or brief those critical points on this highly prejudicial event of restraining a defendant before his jury. The basic raw unfairness is palpable and a violation of the California court's own rules.

In the case of In re Hochberg (1971) 2 C3d 870,875, 87 CR 681, 471 P2d 1, that court wrote:

> "It is elementary that the function of an appellate court, in reviewing a trial court judgment on direct appeal, is limited to a consideration of matters contained in the record of trial proceedings, and that 'matters not presented by the record cannot be considered on the suggestion of counsel in the briefs.'"

Later, relying on this same leading case, the California court turned away a last-minute effort to augment the record on appeal stating, that there was "no justification" for this attempted departure from sound and well-established principles that limit the scope of view to matters either preserved in the record or properly subject to judicial notice." (People v. Collie (1981) 30 C3d 43, 57, 177 CR 458, 634 P2d 534)

As a result of this arbitrary and unusual deprivation of petitioner's ability to prosecute a meaningful appeal, federal principles have been implicated and violated. "It cannot be

[5]Trial counsel's declaration, signed on May 5, 1988 and attached to the petition, talked about some of the security in the courtroom, but did not mention the security rationale he was to come up with over four years later in his October 27, 1992 declaration attached to the response.

gainsaid that meaningful review requires that the appellate court considers the defendant's actual record." (Parker v. Dugger (1991) 498 US 308, 112 LEd 2d 812, 826)[6] The Court continued,

> "What is important . . . is an individualized determination on the basis of the character of the individual and the circumstances of the crime. (Citations omitted) The Florida Supreme Court affirmed Parker's death sentence neither based on a review of the individual record in this case nor in reliance on the trial judge's findings based on that record, but in reliance on some other nonexistent findings."

(Id. at 112 LEd2d p. 826)

Here the California court ignored, as had the Florida court, the evidence submitted by one side by saying it was not properly before the court (although it had been properly submitted). Then, unknown to petitioner, the court decided a critical issue based on evidence that was not in the record and had not been submitted either in the contemporaneous trial record, or by augmentation, or by judicial notice request. It ain't right.[7]

[6]In Parker, this Court was referring to the Florida Supreme Court's action in affirming a death penalty based on matters of defendant's background outside the record.

[7]Petitioner realizes that physically and by mandate of Rule 10 of the Supreme Court Rules, this court is unable legally to correct every judgment that "ain't right." Nevertheless petitioner knows that the court is concerned with decisions that it believes are decided wrong. (See e.g., Oral Advocacy, a Disappearing Art, Rehnquist, C.J., 35 Mercer L.Rev. 1015, 1027 (1984) The "most common reason" for a grant of certiorari is the justices "doubt the correctness" of the lower ruling.)

II.

California's Death Penalty Statute is vague as written and applied in its failure to provide guidelines for the penalty decision in violation of the 8th Amendment and Stringer v. Black

The California Supreme Court has been applying the principles of Stringer v. Black (as it must) by running away from them (which it should not) with its answer to this issue -- Even if there was error, it was harmless. (Appendix A:33-36) The latest case is People v. Mayfield (1993) 5 C4th 142, __ CR2d __, __ P2d __, decided on May 27, 1993, not two months old at this writing.[8]

In petitioner's case, he made the challenge to CPC 190.3 factors (a), circumstances of the crime; (b), other violent criminal activity; and (i), age of defendant. Each was an integral part of the instructions to petitioner's jury. Each was vague under Stringer v. Black, supra, and pursuant to this court's remand in Bacigalupo v. California (1992) 506 US __, 121 LEd2d 5, on

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[8] "Even assuming the age factor to be unconstitutionally infirm as contended, on the record before us we find no prejudice. (Citations to Tuilaepa and two other of its cases all decided on December 28, 1992 are omitted)

"The same conclusion applies to the four sentencing criteria to which defendant objects. On this record, we do not believe that prejudice could have resulted from any error in relying on section 190.3 and reading the challenged instructions. Neither the argument nor the instructions could have focused the jury on any impermissible consideration under that section. The three most relevant considerations -- the circumstances of the crimes, prior criminal activity, and, in mitigation, considerations of background and character -- set forth starkly for the jury's consideration."
(at p. 194)

Stringer grounds, careful consideration was mandated. It was not forthcoming.

The most problematic treatment was given to "other violent activity." The court wrote:

> "Factor (b) focuses the sentencer's attention on other crimes (i.e., punishable offenses) committed by the defendant involving his use or threatened use of force against any person. . . .
>
> "By their express terms, factors (a), (b), and (i) thus direct the sentencer's attention to specific, provable, and commonly understandable facts about the defendant and the capital crime that might bear on his moral culpability. Having met these standards of relevance and specificity, factors (a),(b), and (i) are not 'illusory' or otherwise impermissibly 'vague' (Stringer v. Black, supra, 503 US __ , __ [117 LEd2d 367, 382]) simply because they leave the sentencer free to evaluate the evidence in accordance with his or her own subjective values."

(Appendix A:35-36)

In denying petitioner and the state a reliable penalty verdict the California court failed to appreciate that what happened in this case is exactly what the Stringer decision and Bacigalupo's remand were warning against -- viz., if the standard or guideline is not clear, a jury will be unleashed to exercise its unfettered discretion. In petitioner's case the court found inadmissable six of the ten challenged pieces of aggravation evidence, noting incredibly, "[A]t most, it suggested defendant had difficulty submitting to authority and controlling his violent impulses." (Appendix A:28) Part of the evidence that the court found inadmissable but harmless suggested calculated threats and plans to murder, threats of violent sexual assaults on female guards and

their relatives in language alone which, to some people, might be sin and evidence of malevolent character.

If the California statute is supposed to "focus the sentencer's attention on other crimes (i.e., punishable offenses)," than it has failed where, as here, a jury receives evidence, a substantial part of which (including the entire testimony of two of the seven witnesses) is excluded as not being punishable offenses of violence.

Age of the defendant is another factor that may be considered by the California penalty jury. (CPC 190.3[i]) Petitioner's jury was so instructed. Decisions of the California court again confuse matters for lawyers and judges, therefore how is a lay jury to interpret the vagueness. For example regarding "age," that court has said that mere age may not be aggravating. "As long as neither the prosecutor in argument, nor the court in its instructions, suggests that age is to be considered aggravating, the jurors may determine the relevance, if any, of the defendant's age to the appropriate penalty." (People v. Visciotti (1992) 2 C4th 1, 76, 5 CR2d 495, 825 P2d 388; People v. Lucky (1988) 45 C3d 259, 302, 247 CR 1, 753 P2d 1052; however see People v. Edwards (1991) 54 C3d 787, 884, 1 CR2d 696, 819 P2d 436. "In a given case, the prosecution may argue age is an aggravating factor, and the defense may argue it is mitigating. It is up to the jury to decide, That is the nature of the adversiarial process.")

Under authority of Stringer and other cases relied upon by Stringer, in the instant case there were no guidelines by which this jury could know how to assess petitioner's age as it related

to penalty. The sophomoric argument of the prosecutor is illustrative of the reality that the jury had no guidelines. The argument boiled down to the following:

1. Petitioner was "old enough" to be incarcerated for four or more years. (This was a prior conviction.) (RT 4:841)

2. Petitioner was "old enough" to plan a robbery in which a man was "executed." (Here the prosecutor poured forth two pages of crime facts.) (RT 4:841-3)

3. Petitioner was "old enough" to be held accountable. (He made a decision to kill, therefore he was "a fit subject for the death penalty.") (RT 4:842)

The age factor in CPC 190.3(i), on its face and as applied here through the prosecutor's argument, is constitutionally vague under Stringer. Concerning CPC 190.3(a), the circumstances of the crime, again Stringer compels the conclusion that this subsection suffers from vagueness, and again the peculiar application here only underlines the problem.

In petitioner's case, there was no additional guidance given to the jury by the court concerning the "circumstances of the crime" beyond the language of CPC 190.3(a). The prosecutor argued in pertinent part as follows:

> "As Judge Beam will tell you a little later this morning, you are to consider in determining this issue of life without parole or death the circumstances of the case itself.
>
> "And I really only have this point to make about that. I'm not going to belabor what happened in the bar and the events that you found the defendant guilty of in and of themselves so substantially outweigh any of the mitigating evidence that was presented in this case, that even if it were just those events

> alone, the death penalty would be the appropriate penalty."

(RT 4:853-4) The prosecutor then focused on the events in the bar and how there were "almost" four dead bodies instead of one, ending this line of argument with the following:

> "As much as what happened -- what almost happened. [sic] We were close to that scenario with four dead bodies, and that quite simply is horrendous. And that's why I say, based upon that alone, the aggravating evidence of what happened in the bar that might and what almost happened substantially outweighs whatever mitigating evidence was presented."

(RT 4:854-5)

In other words, but quite directly, the prosecutor argued that petitioner deserved death, not only for what he did, but also for what he almost did. Again, the directions to the jury are vague allowing for freewheeling discretion. The law is capable of drawing finer lines and Stringer and Bacigalupo mandate it.

In conclusion, the decisions in Stringer and Bacigalupo mandate that the constitutional prohibition against vagueness does apply to sentencing factors, and not just the "special circumstances" and, as such, the instructions and prosecutorial argument here only encouraged unfettered discretion by petitioner's penalty jury. As a result petitioner argues that the penalty verdict must be reversed on the grounds that the jury received inadequate instructions and inappropriate argument, thereby inviting an arbitrary and capricious penalty determination in violation of his federal constitutional rights.

III.

Petitioner's death judgment is constitutionally invalid because he was tried to a jury in shackles from beginning to end with no manifest need nor any consideration of less onerous alternatives

How important a question is the improper restraining of petitioner and other defendants? A recent survey, indicated that without a hearing, showing of need or consideration of lesser alternatives, it is routine in some courts, anytime the charge is murder, to use one or more of the following: shackles, belly chain threaded through the chair and around the defendant's body, cuffing or shackling to a large ring under counsel table, and high security courtrooms.[9] More recently an electrical belt that can be triggered by the bailiff from his desk has been added to the security arsenal. This device can deliver a 50,000 volt shock to the defendant should he or she move in a manner not acceptable to the bailiff.[10]

In the instant case, from the beginning to the end of his trial, petitioner was tried while he was physically restrained. His feet were constantly shackled. Additionally, sometimes one or

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[9]While the survey is admittedly limited in that it is limited to California courts, it is difficult to imagine that the principles enunciated by this court to preserve the dignity and decorum of an American courtroom, as well as the presumption of innocence, are only subject to abuse in California. (Shackling: A Refresher on Courtroom Security, Forum, California Attorneys for Criminal Justice, Vol. 20, No. 2, p.36 (1993))

[10]Court Belt May Come As A Shock, San Francisco Daily Journal, May 5, 1993, p.1 (indicating the device is in use in at least five California counties)

wrists were handcuffed or both. Occasionally, even a belly chain was used. There was no contemporaneous hearing regarding the shackling decision, no consideration of less onerous alternatives, and no demonstration of any need whatsoever. Further, and most importantly, the record is void of any disruptive conduct by petitioner. There was none. Therefore it is even more relevant that this court has said that the physical restraining of a contumacious defendant may at times be necessary, but should only be used as "a last resort."

> "Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold."

(Illinois v. Allen (1970) 397 US 337, 344)

In its most recent pronouncement regarding security measures in the courtroom, this Court found that the presence of three to eight uniformed officers (the number varied) in the first row of the trial courtroom did not create an "inherently prejudicial" situation. The court then made the distinction between a defendant guarded by extra security officers from a defendant shackled or in prison garb, noting that the latter connotes dangerousness and culpability. (Holbrook v. Flynn (1986) 475 US 560, 568)

In the California court, petitioner raised his federal claims on this issue vigorously, but neither the respondent in its briefing, nor the court in its opinion found the need to refer to

a single case of this court or of any circuit.[11] Under federal precedent, the unjustified chaining of petitioner violated his 5th, 6th, 8th, and 14th Amendment rights and resulted in a death judgment that is arbitrary, capricious and unreliable.

IV.

Trial counsel's representation was so inadequate that it violated petitioner's constitutional right to counsel and resulted in a trial that was unfair and a death judgment that is unreliable

Petitioner's federal constitutional rights to due process, to effective assistance of counsel, and to be free from an arbitrary and capricious death judgment, as incorporated in the 14th Amendment, were each violated by the inadequate representation by trial counsel through his failure to protect petitioner from the unwarranted and clearly prejudicial shackling of petitioner in front of his jury.

The court has noted in the leading case of Strickland v. Washington (1984) 466 US 668, 695-6, that some errors by counsel will have a "pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture," noting further that courts should be concerned with whether "the result of a particular proceeding is unreliable because of a breakdown in

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[11]In his briefing, petitioner relied at length upon Illinois v. Allen, supra; Spain v. Rushen (9th Cir. 1989) 883 F2d 712, and Hamilton v. Vasquez (9th Cir. 1989) 882 F2d 1469.

the adversary process that our system counts on to produce just results."

CONCLUSION

For all the reasons stated herein, petitioner prays that a writ of certiorari issue to the decision of the California Supreme Court in this matter and that the ultimately the decision of that court be reversed and the matter remanded for further proceedings.

Dated: July 7, 1993

Respectfully submitted,

HOWARD W. GILLINGHAM
Lawyer for Petitioner
PAUL PALALAUA TUILAEPA

SUPREME COURT
FILED
DEC 28 1992
Robert Wandruff Clerk
DEPUTY

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,
Plaintiff and Respondent,
v.
PAUL PALALAUA TUILAEPA,
Defendant and Appellant.

S004786

A jury convicted defendant Paul Palalaua Tuilaepa of the first degree murder and attempted robbery of Melvin Whiddon. (Pen. Code, §§ 187, subd. (a), 211/664.)1/ Defendant was also convicted of six counts of robbery (Lee Malstrom, Russell Knapp, Gary Grose, Larry Swanson, Debra Tomassini, and Bruce Monroe) and of two counts of assault with a firearm (Kelvin Whiddon and Kenneth Boone). (§§ 211, 245, subd. (a)(2).) An allegation that defendant personally used a rifle in the commission or attempted commission of each of the foregoing offenses was found true. (§§ 12022.5,

1/ All further statutory references are to the Penal Code unless otherwise indicated.

SEE CONCURRING OPINIONS

1203.06, subd. (a)(1).) An allegation that defendant inflicted great bodily injury in committing one of the robberies (Bruce Monroe) and both of the assaults (Kelvin Whiddon and Kenneth Boone) was also found true. (§ 12022.7.) Finally, the jury found true a special circumstance that the murder of Melvin Whiddon occurred during the commission of a robbery. (§ 190.2, subd. (a)(17)(i).)

Following a penalty trial, the jury sentenced defendant to death and the trial court denied the automatic motion to modify the verdict. (§ 190.4, subd. (e).) This appeal is automatic. (§ 1239, subd. (b).)

We find no prejudicial error at the guilt or penalty phases of defendant's trial. The judgment will be affirmed in its entirety.

I. GUILT PHASE EVIDENCE

The crimes occurred at 5:30 p.m. on October 6, 1986, at the Wander Inn Bar in Long Beach. Eight surviving victims were called as witnesses for the prosecution at trial. Viewed as a whole, their eyewitness testimony established the following sequence of events:

A small crowd had gathered to watch Monday night football on television. The front and rear doors were open, and daylight streamed in. The interior lights were on, including those located directly above the bar.

Defendant and another man entered the establishment.[2/] Defendant wore a dark jacket and the other man wore a long dark coat. Both men also apparently wore hairnets and "khaki" clothes of some sort. All eight eyewitnesses noticed that defendant was carrying a rifle, and many of them recognized it as a .22-caliber weapon. No one actually saw a weapon in the hands of the other man but -- based on the testimony of one witness described below -- it appears he was carrying a firearm under his coat.

Defendant and his partner approached the bartender, who was standing at the cash register behind the bar with his back to the room. The bartender heard some shouting and turned around. Defendant pointed the rifle in his face and demanded money -- "everything" in the register. The bartender, Malstrom, pulled the tray out of the register and set it and the cash on the bar. Defendant and his partner stuffed the money into their pockets.

The pair then split up and began robbing patrons at the bar. Defendant, who was still holding the rifle, moved down the bar to Malstrom's left and confronted three victims. Specifically, defendant took money belonging to Knapp that was lying on the bar in front of him. Defendant

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2/ Defendant was tried alone. His partner was not identified in these proceedings.

then pushed Grose and grabbed his money from the bar and took his wallet. Defendant also pushed Swanson and took his wallet.

Meanwhile, defendant's accomplice took money and a wallet from two victims on the opposite side of the bar -- Tomassini and Monroe. When the accomplice reached the end of the bar on his side of the room (i.e., to the bartender's right), he encountered twin brothers Melvin and Kelvin Whiddon. The accomplice pushed Melvin from behind, demanded money, and reached for his wallet. Melvin spun around on his stool and started fighting with the robber. At some point, Melvin knocked the accomplice to the ground.

There was no dispute among witnesses that defendant walked towards the scuffle and, holding the rifle at hip or waist level, shot Melvin in the neck.

Defendant then swung the rifle in Kelvin's direction. Kelvin dropped to the floor and tried to hide behind a post, but was shot by defendant in the chest.

Defendant then turned the rifle in the direction of Monroe's wife. Monroe jumped in front of her and was shot by defendant in the abdomen.

Another patron, Boone, testified that after defendant started shooting, the accomplice stood up and "a couple flashes" -- presumably gunshots -- came from underneath the accomplice's coat. Both robbers then ran past Boone towards the rear door. Before exiting the bar,

defendant aimed the gun at Boone, smiled, and shot him in the neck.

The first shooting victim, Melvin, died at the scene. The autopsy physician described the nature of Melvin's injuries at trial. The other three gunshot victims -- Kelvin, Monroe, and Boone -- testified about the serious and, in some cases permanent, physical injury they sustained.

All eight eyewitnesses positively identified defendant at trial and at the preliminary hearing. Each testified that they clearly saw defendant's face from a few inches to a few feet away. Almost everyone had consumed only part of a beer or other alcoholic beverage, and no one had consumed more than one and a half beers.

Of course, not everyone saw, remembered, or described exactly the same details at trial. For example, Knapp positively identified defendant as the man holding the rifle but never saw a second robber. All other witnesses saw both men, but most of them did not get a good look at defendant's accomplice. Tomassini was able to describe what both men were wearing in the greatest detail, and she was the only person who mentioned the khaki clothes and hairnets. In contrast, Malstrom thought defendant might have been wearing a "watchcap," and he did not notice anything on the other robber's head. In addition, while Tomassini believed the incident lasted 10 to 15 minutes, all other witnesses

estimated that it lasted 5 minutes or less. As noted, only Boone suggested that defendant's accomplice was armed.

The prosecution also introduced the testimony of Police Officer Pavek who arrived at the scene shortly after the robbery. He testified that the bar was "in shambles," that there were bloodstains on the floor, and that three casings and two expended bullets from a .22-caliber weapon were found inside. Other details about the investigation were not presented at trial.

The defense presented no evidence at the guilt phase.

II. PENALTY PHASE EVIDENCE

A. Prosecution Case

The prosecution presented evidence of several prior crimes and misdeeds by defendant. None were adjudicated, and all occurred while defendant was in custody, primarily with the California Youth Authority (CYA). Defendant's objections to this evidence will be discussed later in the opinion.

1. Assault - 1982. Sam Fong, a CYA counselor, testified that in May 1982, he witnessed a fistfight between defendant and another ward, Gages. Fong restrained defendant with a chokehold, and another counselor pulled Gages aside. Gages sat down and began "tending to his wounds." When Fong eased his chokehold, defendant lunged at Gages but was quickly subdued again by Fong. Defendant threatened to "get" Gages and "the Northerners," and ordered a nearby comrade to get a knife.

Fong explained that rival gangs from the "North and South" populated the facility, and that Gages was from the North and defendant was from the South. Fong also noted that even though wards were prohibited from possessing knives, they were sometimes made or smuggled inside. A search revealed no knife in the possession of defendant or his comrade. However, the fight between defendant and Gages violated institutional rules and was reported.

2. Threats - 1982. In July 1982, Debra Heron worked as a counselor at a maximum security CYA facility. Heron testified that defendant became verbally abusive when she patrolled the hall outside his cell two different nights. His remarks consisted of sexual taunts and death threats (e.g., "[I'm] going to fuck [you] in [your] fat white ass, bitch" and "rape [you] and [you will] like it" and "kill you [and] your Momma, too"). During one of the episodes, defendant threw a liquid substance against a screened area of the cell -- "tomatoes and possibly water or urine or something of that nature." Cell doors were locked on both occasions. Heron did not believe she was in imminent danger, but defendant's remarks violated institutional rules and were reported.

3. Weapons possession - 1984. CYA counselor Lester Kushner testified that in October 1984, he noticed the "remains of some broken razors" in defendant's cell or on the floor nearby. Institutional rules precluded wards from

possessing more than one razor and from removing the blade. A search revealed two razor blades and two other intact razors on defendant's person. "[O]ther contraband indicating gang-related type items" and several batteries taped together were also found in defendant's cell. Kushner explained that the latter item, "a battery pack," was typically held in the hand and used as a punching or striking device. Defendant was the sole occupant of the cell in which the foregoing items were found. Possession of them violated institutional rules and was reported.

4. Threat - 1984. CYA employee Gregory Bron testified that in November 1984, defendant attended class wearing pants in which the seams had been cut. Bron escorted defendant to his quarters, confiscated the pants, and told defendant he would be issued a new pair and cited for destroying state property. Defendant said he would burn the pants and burn Bron's face. Bron explained that other wards had previously injured staff by igniting "match bombs," i.e., small containers packed with severed matchheads. Bron did not believe he was in imminent danger, but defendant's remarks violated institutional rules and were reported.

5. Threats - 1985. In September 1985, Michelle McDowell Roberts worked as a supervisor at a maximum security CYA facility. Roberts testified that defendant became verbally abusive when she patrolled the hall outside his room two different nights. He threatened some sort of torture and

death, and sexually taunted her (e.g., "how would I like his dick up my ass"). On both occasions, defendant was locked in a room or cell. Roberts apparently did not believe she was in imminent danger, but defendant's remarks violated institutional rules and were reported.

6. Assault - 1986. Robert Sedillo, a CYA supervisor, described an incident that occurred when he escorted defendant from the infirmary in May 1986. Defendant kicked another ward in the face as he sat in the hallway waiting for a medical appointment. The attack appeared to be unprovoked, and both defendant and his victim had their hands handcuffed behind their backs at the time. The assault violated institutional rules and was reported.

7. Robbery and assault - 1987. Daniel Chatters and defendant shared a cell in the courthouse lockup at the time of trial in this case. Chatters testified that a few days before his testimony, defendant became angry when Chatters would not give money to defendant. Defendant repeatedly struck and injured Chatters, and took $12 that Chatters was carrying on his person.

B. Defense Case

1. Family history. Defendant's mother Mrs. Tuilaepa and his sister Sanita testified as follows: Defendant was raised in a two-parent home and is the youngest of 12 children. The family moved to the United States from Samoa when defendant was a boy. Mrs. Tuilaepa never learned

to speak English, and the family apparently communicates in Samoan.

Defendant was purportedly well behaved as a child. However, he began getting into trouble with his friends at age 14 or 15, and was periodically removed from the home by authorities.

The family has experienced many difficulties over the years but has apparently remained close. Defendant's father died a few years before the capital trial, and one of defendant's brothers was shot and killed in a fight. Another brother, Joe, was shot at a party and is now paralyzed and confined to a wheelchair. As adults, defendant and Joe lived with their mother, and defendant assisted in Joe's care. Sister Sanita and her husband were active in the church and, along with their children, lived with Mrs. Tuilaepa. Several family members regularly attended the capital trial. Mrs. Tuilaepa and Sanita testified that the family cares for defendant and wants his life to be spared.

2. Expert testimony. Dr. Maloney, a psychologist, performed various psychological and intelligence tests on defendant and interviewed members of his family. Dr. Maloney saw no sign of "neurological disability," but noted defendant appeared depressed and reticent when interviewed. Defendant performed poorly on verbal tests and received an IQ score in the low 70's, placing him in the bottom 5 percent of the population. However, on tests of nonverbal reasoning,

defendant performed in the normal range. Dr. Maloney concluded that defendant has "normal intellectual potential" but is deficient in his knowledge and understanding of English. The results were "not surprising" since defendant spent the first few years of his life in Samoa and the family communicates primarily in Samoan. Dr. Maloney testified that defendant has the mental capacity to understand that homicide is wrong.

III. GUILT PHASE ISSUE

Defendant challenges the guilt judgment solely on the ground he was improperly shackled in the trial court. For reasons we will explain, no prejudicial error occurred.

A. Background

The contemporaneous record of proceedings before and during trial is silent on whether defendant was shackled or physically restrained.

Appellate counsel raised the shackling question towards the end of a record settlement and correction hearing held about a year after the penalty verdict was rendered. The hearing was conducted by the judge who presided at trial and took place in the same courtroom. The district attorney who prosecuted the case and defendant's trial and appellate counsel were also present.

In response to appellate counsel's request for a stipulation on whether defendant was restrained during trial, the district attorney, trial counsel, and the court orally

agreed that defendant's ankles were always shackled in some manner, but that his chair was pushed "all the way" under the table so the jury could not see his feet. None of these participants recalled any handcuffs or chains on defendant's wrists, hands, or waist in the jury's presence. The district attorney and trial counsel maintained that defendant entered and exited the courtroom through a rear door that was evidently private, and that the jury "always" waited outside in the hallway until defendant was seated and his ankle restraints were presumably hidden from view. In response to a specific reference in the record on voir dire, no one recalled whether defendant actually stood up and faced prospective jurors while shackled.3/

Trial counsel testified at the record settlement hearing in a manner consistent with the foregoing stipulated facts. Counsel further recalled under oath that defendant was thought to be dangerous and a flight risk during trial because he and a brother in attendance were gang members.

Defendant testified at the same hearing but gave a somewhat different version of events. Defendant said he always wore ankle shackles and occasionally wore handcuffs

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3/ The record indicates that, during voir dire, the court asked defendant to stand up and turn towards prospective jurors "if you can." Appellate counsel suggests here, as at the record settlement hearing, that this language implies defendant was restrained at the time.

and a waistchain in the courtroom and courthouse. Defendant claimed he "sometimes" entered the courtroom through the private door and "sometimes" entered through the outer hallway. Defendant testified that, on some of the latter occasions, he could "see jurors" in the hall. He did not say whether they were jurors in his case or whether they saw him.

Over the district attorney's objection, appellate counsel was allowed to conduct an "experiment" in an effort to "settle" the record as to whether defendant's restraints could have been seen by the jury. At the direction of appellate counsel, trial counsel stood and sat in the "general area" of the jury box and said he could see the waist chain and ankle shackles defendant was then wearing. The district attorney and trial counsel each observed, however, that some of the furniture, particularly defendant's chair, was not in the same position during the experiment as during trial.

Appellate counsel also moved to take photographs of the courtroom and send a questionnaire to jurors asking whether defendant had been restrained during trial. The district attorney objected on grounds such matters could not properly be included in the appellate record. The court agreed and denied defendant's request.

The court did not make any findings or issue a settled statement about shackling after the hearing.

B. Analysis

Based on the foregoing facts, defendant assumes he was subjected to physical restraints that were visible to the jury. Defendant observes there was no evidence or finding of a "manifest need" for such security measures and no instruction informing the jury to disregard the restraints as required by People v. Duran (1976) 16 Cal.3d 282, 291-292. According to defendant, noncompliance with Duran prejudicially violated his rights under the Fifth, Sixth and Eighth Amendments to the federal Constitution and comparable provisions of the state Constitution (art. I, § 7) and statute (§ 688).

We disagree. It is settled that the use of physical restraints in the trial court cannot be challenged for the first time on appeal. Defendant's failure to object and make a record below waives the claim here. (People v. Stankewitz (1990) 51 Cal.3d 72, 95; People v. Walker (1988) 47 Cal.3d 605, 629; People v. Duran, supra, 16 Cal.3d 282, 289.)

In apparent recognition of the waiver problem, defendant argues trial counsel was ineffective in failing to object to the use of restraints. However, counsel's performance could not possibly have affected the outcome at trial. The guidelines imposed by People v. Duran, supra, 16 Cal.3d 282, 290, are intended, in large part, to avoid prejudice in the minds of jurors where a defendant appears or testifies in obvious restraints, or where the restraints deter him from taking the stand in his own behalf. We have

consistently found any unjustified or unadmonished shackling harmless where there was no evidence it was seen by the jury. (People v. Cox (1991) 53 Cal.3d 618, 652 [defendant's handcuffs and leg braces not seen by jury]; People v. Medina (1990) 51 Cal.3d 870, 897-898 [same]; see also People v. Allen (1986) 42 Cal.3d 1222, 1264 [shackles of defense witness not seen by jury]; People v. Fierro (1991) 1 Cal.4th 173, 220 [defendant's handcuffs and shackles not seen by key prosecution witness at preliminary hearing].) In Cox and Medina, we also found no evidence the restraints influenced the defendant's decision not to take the stand.

Nothing in the record on appeal clearly establishes that the jury did or could see defendant's restraints. The court and counsel agreed that efforts had been taken to conceal defendant's ankle shackles from the jury whenever he appeared in court. Defendant's posttrial "experiment" did not conclusively show such efforts had failed. Defendant's version of events also implied, at most, that jurors might have seen him handcuffed and/or shackled in the hallway of the courthouse and might have assumed such restraints were not removed during trial. However, the trial court made no findings in this regard and never credited defendant's account. In addition, defendant did not testify at any phase of trial and there is no indication he would have testified but for the restraints.

Even assuming the jury saw the restraints under the circumstances suggested by defendant, the result remains the same. Prejudicial error does not occur simply because the defendant "was seen in shackles for only a brief period either inside or outside the courtroom by one or more jurors or veniremen." (People v. Duran, supra, 16 Cal.3d 282, 287, fn. 2.) The judgment was reversed in Duran based on multiple errors in a close case, including improper exclusion of evidence, restrictive cross-examination, and the heavy shackling of a defendant who took the stand and whose credibility was presumably damaged as a result. (Id., at pp. 295-296.) In subsequent cases, however, visible shackling did not warrant reversal of the judgment. (People v. Sheldon (1989) 48 Cal.3d 935, 946; People v. Rich (1988) 45 Cal.3d 1036, 1084-1085.)

The instant case is analogous to Sheldon and Rich. Strong guilt evidence in the form of eight positive eyewitness identifications established that defendant shot four individuals and killed one of them in the course of robbing people in a neighborhood bar. No other guilt errors are raised on appeal or evident from the record, and no prejudicial error occurred at the penalty phase for reasons we will explain. Defendant elected not to testify in his own behalf. Any glimpse jurors might have received of the restraints as defendant entered the courtroom could not

possibly have shocked them or affected their assessment of the evidence.4/

Defendant also argues the trial court erred in denying his posttrial motion to "settle" the record with photographs of the courtroom and jury questionnaires about shackling. Defendant insists he was deprived of his right to an adequate record and meaningful appeal as a result.

We disagree. The rules authorizing settlement, augmentation, and correction of the record on appeal concern documents "file[d] or lodged" in the superior court and transcripts of "oral proceedings" that occurred therein. (Cal. Rules of Court, rules 7(b), 12(a), 36(b).) These provisions -- much like the entire network of rules governing matter properly included in the appellate record -- are intended to ensure that the record transmitted to the

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4/ Defendant asks that we take judicial notice of two juror declarations, one by Foreman Sheby and the other by Alternate Juror Shilinga. Although the declarations differ in several respects, Sheby and Shilinga agree that they occasionally saw defendant enter the courtroom in some type of restraints and neither one says the restraints were thereafter removed.

Contrary to what defendant argues, the facts asserted in the declarations are subject to dispute, are not readily verifiable, and are not the proper subject of judicial notice. (Evid. Code, § 452, subd. (h); see also § 459.) The declarants themselves disagree on the frequency and type of restraints, and they do not uniformly describe the vantage point from which the restraints were allegedly seen. Similar discrepancies also exist between the juror declarations on the one hand and the facts as remembered by the court and counsel at the record settlement hearing on the other hand.

In any event, the declarations add little to defendant's posttrial testimony suggesting jurors might have seen his restraints as he entered the courtroom. No prejudice is shown for reasons already stated.

reviewing court preserves and conforms to the proceedings actually undertaken in the trial court. (See, e.g., People v. Pinholster (1992) 1 Cal.4th 865, 922 [settled statement of unreported bench conferences between court and counsel]; People v. Wright (1990) 52 Cal.3d 367, 401, fn. 6 [settled statement of unreported bench discussion between court and juror]; People v. Holloway (1990) 50 Cal.3d 1098, 1116 [settled statement of unreported in-chambers discussion between court and counsel].) The settlement, augmentation, and correction process does not allow parties to create proceedings, make records, or litigate issues which they neglected to pursue earlier.

Because there were no motions or oral proceedings concerning shackling in the trial court, there was nothing for the parties to "settle" here. Defendant is entitled to an appellate record that accurately reflects what was done and said in the trial court -- not what he wishes had been done or said. It follows that all of defendant's posttrial efforts to create a record on this issue were unauthorized and incompetent. Hence, the trial court's decision to bar some of these efforts, namely photographs and questionnaires, cannot warrant reversal of the judgment.

IV. PENALTY PHASE ISSUES

A. Death-qualifying Voir Dire

At defendant's request, the court limited voir dire on the death penalty to four standard questions based on

Witherspoon v. Illinois (1968) 391 U.S. 510 (Witherspoon). Under Witherspoon, a prospective juror can be excluded for cause where he makes it "unmistakably clear" he would "automatically" vote a certain way on penalty. (Id., at p. 522, fn. 21.) A juror with such views is also "substantially impair[ed]" and excludable under Wainwright v. Witt (1985) 469 U.S. 412, 424 (Witt). Witt clarified Witherspoon and was decided before jury selection began in this case.

The court instructed prospective jurors before individual voir dire began (see Hovey v. Superior Court (1980) 28 Cal.3d 1, 80) that they were to give yes or no answers to the foregoing questions. During each individual session, the court typically presented the Witherspoon questions, sought some clarification, and then permitted counsel to ask follow-up questions.

Defendant first challenges the manner in which the court questioned three prospective jurors (Maloney, Harris, Donlan). Defendant insists the court "coerced" them into answering "yes" to the Witherspoon questions that sought to ascertain a pro-life bias. Defendant also contends the court failed to vigorously pursue whether the "yes" answers given were sincere and unequivocal. The prosecutor successfully challenged Maloney and Harris for cause, and used a peremptory challenge to strike Donlan.

We see no error in the court's voir dire. As to all three jurors, the court indeed urged a definitive answer

where an equivocal or ambiguous one was initially given, or re-asked the question in a slightly different way when a "yes" answer was given. However, the questions logically called for a definitive answer, and there was nothing inherently coercive in the court's method. We can only assume the court ended questioning when it determined that the "yes" answer given by each juror was sincere. No restrictions were placed on defendant's right to question them further.

Defendant contends trial counsel was ineffective in failing to sufficiently rehabilitate five prospective jurors who indicated to the court that they were predisposed against the death penalty (Maloney, Harris, Haley, Groeppel, and Sedlack). The prosecutor successfully challenged all of them for cause.

Nothing in the record indicates that counsel lacked a plausible, tactical reason for asking these individuals few or no follow-up questions. (See, e.g., People v. Lewis (1990) 50 Cal.3d 262, 289-290.) Indeed, counsel might have determined from the demeanor of these prospective jurors that additional questioning would be futile. Counsel might also have reasonably concluded that any ambiguity in the answers they had already given would be beneficial and would promote

retention of pro-life jurors.[5] No constitutional deficiency in counsel's performance on voir dire has been shown.[6]

B. Boyd Claim

Defendant challenges several unadjudicated acts of misconduct admitted in the prosecution's case-in-chief at the penalty phase. Defendant observes that "criminal activity" involving the "use or attempted use of force or violence or the express or implied threat to use force or violence" is admissible under section 190.3, factor (b) (hereafter factor (b)). Defendant argues here, as he did to some extent below, that the challenged evidence does not satisfy the "crime" and/or "violence" requirement of factor (b), and that it was therefore irrelevant to any statutory aggravating factor. (People v. Boyd (1985) 38 Cal.3d 762, 772-778.)[7]

5/ For example, in response to the court's questioning, prospective Juror Harris ambiguously indicated that she had "mixed" feelings about the death penalty and believed it was appropriate "in some cases," but that she would "automatically" refuse to consider or vote for it in the instant case. Defense counsel then asked Harris whether any preference for life imprisonment extended to "every" case, and she said, "yes." Counsel asked no further questions. He could reasonably have concluded that further inquiry along these lines might only solidify Harris's apparent pro-life bias and increase the likelihood that she would be excused.

6/ Defendant also argues trial counsel was ineffective because he did "nothing" to explore prospective jurors' attitudes towards racial prejudice. However, counsel has no duty in the abstract to inquire on a particular subject. There is also no indication that any biased individual actually sat on defendant's jury.

7/ For the most part, any Boyd objections raised below were handled in an evidentiary hearing held before the start of the penalty trial.

On appeal, such claims must be rejected where there is substantial evidence from which a jury could conclude beyond a reasonable doubt that violent criminal activity occurred. (People v. Boyd, supra, 38 Cal.3d at p. 778.) As we will explain, no prejudicial error occurred in this post-Boyd penalty trial.

1. Assault - 1982. Defendant first complains about Fong's testimony describing a fistfight between defendant and another CYA inmate. Defendant recognizes that evidence of a "jailhouse scuffle" is admissible under factor (b) where the jury could conclude the defendant was not acting in self-defense and was therefore guilty of criminal assault. (People v. Lucky (1988) 45 Cal.3d 259, 291.) Defendant appears to concede that Fong's "scuffle" testimony was admissible under Lucky, but asks us to reconsider that rule.

We decline to do so. The Attorney General correctly observes that defendant did not object to this evidence on any grounds at trial, and has therefore waived the claim. (People v. Mickle (1991) 54 Cal.3d 140, 186.) In any event, Fong's testimony strongly suggests that defendant was not only a willing combatant but the aggressor in the incident. (People v. Lucky, supra, 45 Cal.3d 259, 291.) Defendant apparently had the upper hand in the fight because only his opponent, Gages, was injured. Even after defendant was restrained and Gages retreated to nurse his wounds, defendant attempted to inflict additional harm and threatened future

retaliation when officials intervened a second time. The penalty jury was entitled to know that defendant engaged in such disruptive, assaultive behavior in custody.

Defendant also insists the court erred in allowing Fong to suggest that defendant's threat against Gages and other "Northerners" was a gangland reference, and that the two combatants were affiliated with rival groups. Defendant insists this evidence was irrelevant and prejudicial, and that it should have been excised from any otherwise admissible portion of Fong's testimony.

Lack of an objection at trial waives the claim on appeal. And, contrary to defendant's suggestion on the merits, nothing bars evidence of gang affiliation that is directly relevant to a material issue. (Compare Dawson v. Delaware (1992) __ U.S. __ [112 S.Ct. 1093, 1098]; People v. Cardenas (1982) 31 Cal.3d 897, 904-906.) Testimony linking defendant and Gages to rival gangs was admissible because it tended to explain the reason for the fight. (See People v. Melton (1988) 44 Cal.3d 713, 757.) We have only suggested a contrary result under factor (b) where no connection between prison gangs and violent prison crime was made. (See, e.g., People v. Malone (1988) 47 Cal.3d 1, 30.) Here, the jury was entitled to know that the assault on Gages was evidently not the product of a personal grievance but of a larger social evil.

2. Weapons possession - 1984. Defendant next challenges Kushner's testimony describing several

unauthorized items found in defendant's CYA cell. Defendant claims that, because the extra razors and razor blades and the "battery-pack" are not inherently "deadly," there was insufficient evidence from which the jury could infer he violated laws prohibiting possession of deadly weapons by inmates. (See, e.g., § 4574, subd. (a).) Defendant also suggests mere possession of even a deadly weapon does not involve the threat of violence. He does not dispute that discovery of the items on his person and in his cell amounted to "knowing" possession.

We reject the Attorney General's suggestion that the claim has been waived. Defendant preserved the issue by raising a similar, comprehensive challenge to the "razor incident" before the evidence was admitted at trial.

Nevertheless, the claim fails on the merits. It is settled that a defendant's knowing possession of a potentially dangerous weapon in custody is admissible under factor (b). Such conduct is unlawful and involves an implied threat of violence even where there is no evidence defendant used or displayed it in a provocative or threatening manner. (People v. Ramirez (1990) 50 Cal.3d 1158, 1186-1187; People v. Lucky, supra, 45 Cal.3d 259, 291-292; People v. Harris (1981) 28 Cal.3d 935, 962-963.) The trier of fact is free to consider any "innocent explanation" for defendant's possession of the item, but such inferences do not render the evidence inadmissible per se. (People v. Mason (1991) 52

Cal.3d 909, 956-957.) Hence, the court did not err in admitting evidence about the razors and blades and the "battery-pack" found in defendant's possession at CYA.

Defendant also argues that Kushner's related testimony about "contraband" of a "gang-related" nature was inadmissible because there was no evidence defendant's possession of these unspecified items was criminal or involved any threat of violence. We agree. However, the reference to "contraband" was brief and vague and could not have been prejudicial in light of other more serious evidence of defendant's misconduct in custody, namely, weapons possession, three separate assaults, and one robbery. Similarly, Kushner's reference to the possession of "gang" paraphernalia was cumulative given other properly admitted testimony about the gang-motivated assault upon Gages.

3. Threats - 1982, 1984, 1985. As noted, the prosecution introduced evidence of several outbursts at CYA. Two female supervisors, Heron and Roberts, testified that defendant was locked in his cell in a maximum security facility at the time he made sexual taunts and death threats, and Roberts said defendant threw a vile liquid against a screened area of the cell during one of the episodes. A male advisor, Bron, testified that he reprimanded defendant for cutting the seams on his pants and that defendant threatened to burn the pants and burn Bron's face. Bron also mentioned the use of "matchbombs" by other inmates.

Defendant challenges testimony by all three witnesses recounting his in-custody statements. He relies on the general notion that abusive and even threatening language does not violate a penal statute and is inadmissible under factor (b). (See People v. Wright, supra, 52 Cal.3d 367, 425-426 and cases cited.) Defendant also argues that evidence of other circumstances surrounding the outbursts was not independently admissible, e.g., thrown liquid, torn pants, unrelated "matchbomb" incidents, and defendant's maximum security status.

Some of these Boyd claims have been waived. At trial, defendant challenged the "threat" testimony given by Heron and Roberts, but did not repeat the objection when the admissibility of Bron's testimony was raised later in the proceedings. Defendant also did not make and preserve objections to any other details described by these witnesses.

On the merits, we disagree with the Attorney General's claim that the threats violated section 71, which prohibits certain threats against public employees.[8/] There

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[8/] Section 71 provides that "[e]very person who, with intent to cause, attempts to cause, or causes, . . . any public officer or employee to do, or refrain from doing, any act in the performance of his duties, by means of a threat, directly communicated to such person, to inflict an unlawful injury upon any person or property, and it reasonably appears to the recipient of the threat that such threat could be carried out" is guilty of a crime.

was no substantial showing that defendant harbored the requisite intent -- interfering with the performance of official duties -- or that his statements had the requisite effect -- creating a reasonable belief the threat would be carried out. (People v. Boyd, supra, 38 Cal.3d 762, 777.) Defendant had no apparent history of attacking or injuring CYA officials, and the recipients of these threats indicated they did not actually fear for their safety. Defendant was locked in his cell for the night when he harassed the two women, and his response to Bron's criticism was obviously intended as an angry retort.

We are also not persuaded by the Attorney General's attempt to characterize the act of throwing liquid in Heron's presence as an assault and battery. Nothing in the record suggests the liquid touched her or was even thrown in her direction. (Compare People v. Pinholster, supra, 1 Cal.4th 865, 961 [act of throwing urine in deputy's face is admissible under factor (b)].) This incident, like the damaged pants seized by Bron, can only reasonably be construed as inadmissible property damage. (People v. Boyd, supra, 38 Cal.3d 762, 776-777.) In addition, Bron's reference to "matchbomb" injuries inflicted by other inmates was irrelevant absent any evidence connecting defendant to these events. The "maximum security" status described by the two female witnesses did not provide context for any other admissible act.

Nevertheless, the foregoing testimony was harmless. At most, it suggested defendant had difficulty submitting to authority and controlling his violent impulses. The jury could draw the same unfavorable character inferences from evidence properly admitted in aggravation. The circumstances of the capital crimes included defendant's attempt to kill four bar patrons in a gratuitous and cold-blooded manner. Admissible background evidence also showed a pattern of nonconforming and violent behavior, namely three assaults and the possession of potentially dangerous weapons in custody. At least two of the assaults were unprovoked, two occurred in the presence of CYA officials, and one was incidental to a robbery. There is no reasonable possibility the penalty verdict would have been different absent evidence of threats and insults against CYA personnel.

C. "Other-crimes" Instruction

The court gave the standard instruction prohibiting the jury from considering other violent crimes admitted in aggravation under factor (b) unless they had been proven beyond a reasonable doubt. The instruction did not describe or otherwise identify any of the acts to which it might

apply. Both the prosecutor and defense counsel requested and approved the instruction as given.9/

Defendant claims the trial court erred in not including in the instruction the names and elements of the crimes offered by the prosecution under factor (b). Defendant argues that, absent such a "frame of reference," the jury might have improperly based their penalty determination on acts which were not criminal or violent or which had not been proven to the requisite level of certainty. Defendant claims his constitutional rights to due process and a reliable penalty determination were violated as a result.

However, as defendant seems to concede, it was settled even before the penalty trial in this case that the trial court has no sua sponte duty to instruct in the manner now urged. (People v. Hardy (1992) 2 Cal.4th 86, 205-207; People v. Mitcham (1992) 1 Cal.4th 1027, 1075; People v. Davenport (1985) 41 Cal.3d 247, 281-282; People v. Phillips

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9/ The instruction said, in full: "Evidence has been introduced for the purpose of showing that defendant Tuilaepa has committed criminal acts which involved the express or implied use of force or violence or the threat of force or violence. Before you may consider any of such criminal acts as an aggravating circumstance in this case, you must first be satisfied beyond a reasonable doubt that the defendant did in fact commit such criminal acts. You may not consider any evidence of any other criminal acts as an aggravating circumstance." (See CALJIC No. 8.84.1.2 (1983 New).)

(1985) 41 Cal.3d 29, 68 & 72-73, fn. 25.) The rule recognizes that, for tactical reasons, defendants in the vast majority of cases do not want to risk highlighting prior violent crimes or alienating the jury with hypertechnical defenses to bad acts which otherwise seem clearly aggravating. Hence, in the absence of a request from the defense, the court did not err in failing to give a more detailed factor (b) instruction.

Defendant claims counsel's failure to request such an instruction amounted to ineffective assistance. However, nothing in the record indicates counsel lacked a plausible tactical reason for failing to request additional instruction on aggravating crimes and elements. (People v. Pope (1979) 23 Cal.3d 412, 426, fn. 16.) To the contrary, the record suggests counsel sought to deemphasize the significance of defendant's misconduct in CYA. Counsel stressed in closing argument that defendant had no prior felony convictions, and that any unadjudicated CYA violations might have been "distasteful" but were forgivable given defendant's youth at the time. Defendant has not met his burden of establishing constitutionally deficient representation in counsel's failure to request an instruction highlighting the conduct the jury could consider under factor (b).

In any event, we reject defendant's claim that he was prejudiced by the lack of such an instruction. Our review of the record discloses convincing evidence of all

criminal conduct properly admitted under factor (b) -- the fight with inmate Gages, the unprovoked assault on another ward outside the infirmary, the assault and robbery of inmate Chatters, and the possession of potentially dangerous weapons in CYA. There is no indication that an instruction on specific crimes and elements would have changed the jury's assessment of evidence admitted under factor (b) or would have affected the outcome at trial.

D. Instruction on Sentencing Discretion

The court gave the 1986 version of CALJIC No. 8.84.2. The instruction explains the manner in which the jury is to weigh the aggravating and mitigating circumstances and select the appropriate punishment, and was drafted in response to People v. Brown (1985) 40 Cal.3d 512 (revd. on other grounds sub nom. California v. Brown (1987) 479 U.S. 538). At issue here is a portion of the instruction saying that "[to] return a judgment of death, each [juror] must be persuaded that the aggravating evidence is so substantial in comparison with the mitigating [evidence] that it warrants death instead of life without parole." (Italics added.)10/

10/ The instruction stated, in full: "It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant. [¶] After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. [¶] The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are
(Footnote continued on next page.)

On its written verdict form, the jury specifically found that aggravation "substantially outweigh[ed]" mitigation.

Defendant notes that the instruction, as given, did not contain language from section 190.3 saying that the jury "shall impose" life imprisonment if it finds mitigation outweighs aggravation. Defendant argues that omission of this language and the alleged ambiguity of the "so-substantial" language gave the jury unfettered discretion to impose death. He insists these instructional features violated the due process, ex post facto, and cruel and unusual punishment clauses of the federal and state Constitutions.

(Footnote continued from previous page.)
permitted to consider. In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole. [¶] You shall now retire and select one of your number to act as foreman, who will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree." (See CALJIC No. 8.84.2 (1986 Rev.).)

We disagree. As noted, the instruction used language suggested by People v. Brown, supra, 40 Cal.3d 512, 541-542, footnote 13. There, we noted that because aggravating and mitigating circumstances are weighed in the context of determining which of the law's two most serious penalties applies, the jury must understand that the decision is not whether the "bad" evidence outweighs the "good" but whether defendant is deserving of the most severe punishment -- death. Consistent with Brown, the instructional language makes manifestly clear that death may be imposed only where aggravation "so substantially" outweighs mitigation that death, rather than life imprisonment, is appropriate. The converse principle emphasized by defendant here -- that the jury must impose life imprisonment in all other circumstances -- is obvious, and no reasonable jury could have been misled in this regard.

We used the same reasoning to reject a similar attack on the same instructional language in People v. Duncan (1991) 53 Cal.3d 955, 978. Defendant asks us to reconsider Duncan, but we see no reason to do so. We conclude the jury was properly instructed on the scope of its sentencing discretion.

E. Constitutionality of the Death Penalty Law

Defendant broadly attacks the constitutionality of section 190.3, which enumerates the factors deemed relevant to the capital sentencing determination. Defendant argues

that submission to the penalty jury of factors (a) (circumstances of the capital crime), (b) (other violent criminal activity), and (i) (defendant's age at time of crime), without further clarifying language not identified here, precludes a meaningful and guided distinction between those murders that warrant the death penalty and those that do not.[11/] Assuming without deciding that section 190.3 is subject to such "vagueness" concerns (see Stringer v. Black (1992) 503 U.S. __ [117 L.Ed.2d 367]), we reject this claim.

It is settled that the "facts and circumstances of the defendant, his background, and his crime" are relevant to the sentencing decision (Clemons v. Mississippi (1990) 494 U.S. 738, 748), and that the State, within certain limits, has broad latitude to decide how such facts are to be

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11/ Section 190.3 provides in pertinent part: "In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: [¶] (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true . . . . [¶] (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence. . . . [¶] (i) The age of the defendant at the time of the crime."

presented and considered at the penalty phase (Payne v. Tennessee (1991) 501 U.S. __ [115 L.Ed.2d 720, 735]; Boyde v. California (1990) 494 U.S. 370, 377). By the same token, the individualized penalty determination required by the Eighth Amendment makes inevitable application of the sentencer's own values, perceptions, and experiences to the factors the State properly deems relevant. (Eddings v. Oklahoma (1982) 455 U.S. 104, 110-112.)

As we very recently held, the language of factor (a), concerning the "circumstances of the [capital] crime," embodies a consideration that the United States Supreme Court itself has identified as "one of the criteria upon which the jury should base its penalty determination," and withstands the type of vagueness challenge raised here. (People v. Proctor (199_) __ Cal.4th __, __, and cases cited.) Factor (b) focuses the sentencer's attention on other crimes (i.e., punishable offenses) committed by the defendant involving his use or threatened use of force against any person. (People v. Phillips (1985) 41 Cal.3d 29, 72; People v. Boyd (1985) 38 Cal.3d 762, 776.) Factor (i) directs the sentencer to consider whether the defendant's age at the time of the capital crime gives rise to inferences about his relative youth or maturity which in "common experience or morality . . . might reasonably inform the choice of penalty . . . ." (People v. Lucky (1988) 45 Cal.3d 259, 302.)

By their express terms, factors (a), (b), and (i) thus direct the sentencer's attention to specific, proveable, and commonly understandable facts about the defendant and the capital crime that might bear on his moral culpability. Having met these standards of relevance and specificity, factors (a), (b), and (i), are not "illusory" or otherwise impermissibly "vague" (Stringer v. Black, supra, 503 U.S. __, __ [117 L.Ed.2d 367, 382]) simply because they leave the sentencer free to evaluate the evidence in accordance with his or her own subjective values.

Defendant also argues that the 1978 death penalty statute is unconstitutional because it lacks adequate safeguards to protect against "arbitrary" death judgments and ensure "guided" sentencing discretion. He concedes we have implicitly or explicitly rejected all of his claims before, but asks us to reconsider our conclusions. (See, e.g., People v. Rodriguez (1986) 42 Cal.3d 730, 777-779.) We affirm that, contrary to defendant's contentions:

1. The jury need not employ the beyond-a-reasonable-doubt standard in deciding whether aggravating factors (other than violent criminal conduct) are present, whether aggravation outweighs mitigation, and whether death is the appropriate sentence;

2. The jury need not make written findings or agree unanimously on the presence of aggravating factors;

3. The jury need not be instructed to presume that life without possibility of parole is the appropriate sentence;

4. Existing appellate procedures provide for adequate review of a death judgment.

V. DISPOSITION

The judgment is affirmed in its entirety.

BAXTER, J.

WE CONCUR:

LUCAS, C.J.
PANELLI, J.
ARABIAN, J.
GEORGE, J.

C O P Y

PEOPLE v. TUILAEPA

S004786 [Crim. 26420]

CONCURRING OPINION BY MOSK, J.

I concur in the judgment. After review, I have found no reversible error or other defect.

I write separately to make two points, one specific to this case and the other of more general applicability.

The first concerns defendant's appointed trial counsel, an attorney who is no stranger to this court. (See, e.g., People v. Wilson (1992) 3 Cal.4th 926; In re Wilson (1992) 3 Cal.4th 945.) To my mind, counsel's performance was deficient in many regards. That is to say, it failed to satisfy an objective standard of professional reasonableness. Nevertheless, his failings did not subject the defense to prejudice. No reasonable probability exists that a more favorable outcome would have resulted in their absence. Hence, counsel's assistance was not ineffective under either the Sixth Amendment to the United States Constitution or article I, section 15 of the California Constitution. (See generally People v. Ledesma (1987) 43 Cal.3d 171, 215-218 [discussing both federal and state constitutional provisions].)

The second point relates to defendant's claim under Stringer v. Black (1992) 503 U.S. ___ [112 S.Ct. 1130] (Stringer). As I stated in my dissenting opinion in People v. Proctor (1992) ___ Cal.4th ___:

"In Stringer, the United States Supreme Court held that 'if a State uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion' in contravention of the Eighth Amendment. [Citation.] It explained: 'Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance.' [Citation.] Of course, California uses 'aggravating factors' -- labeled 'special circumstances' [citation] -- to determine death eligibility. It also uses 'aggravating factors' -- bearing

that very label [citation] -- to decide between life and death.

"A narrow Stringer challenge could specifically attack any one or more of the factors set out in the standard jury instruction on the determination of penalty as vague and, for that reason, likely to invite an arbitrary and capricious choice of punishment in violation of the Eighth Amendment. . . .

"A broader Stringer challenge could generally attack the standard jury instruction on the determination of penalty as vague at its very core and, for that reason, highly likely to invite an arbitrary and capricious choice of punishment in violation of the Eighth Amendment." (People v. Proctor, supra, ___ Cal.4th at pp. ___-___ (dis. opn. of Mosk, J.) [typed dis. opn. at pp. 14-16].)

Defendant's Stringer challenge is narrow. He attacks factor (a), the "circumstances of the crime"; factor (b), the "presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence"; and factor (i), the "age of the defendant at the time of the crime."

At the outset, the majority "[a]ssum[e] without deciding" that the factors set out in the standard jury instruction on the determination of penalty are subject to

attack for vagueness under Stringer. (Maj. opn., ante, at p. ___ [typed maj. opn. at p. 34].) That "assumption" is unnecessary. The United States Supreme Court has all but expressly decided the issue. The factors are subject to attack. (See Bacigalupo v. California (1992) ___ U.S. ___ [113 S.Ct. 32], vacating and remanding People v. Bacigalupo (1991) 1 Cal.4th 103, for further consideration in light of Stringer v. Black, supra, 503 U.S. ___ [112 S.Ct. 1130].)

The majority then proceed to reject defendant's Stringer challenge. They do so because they themselves do not find factors (a), (b), and (i) to be vague. But "[w]hat is dispositive is not what jurists on appellate courts may announce, but what lay persons on juries may understand." (People v. Proctor, supra, ___ Cal.4th at p. ___ (dis. opn. of Mosk, J.) [typed dis. opn. at p. 16].) In this regard, consider factor (i). We have held that "age" can be aggravating or mitigating or neither depending on the peculiar facts of the individual case. (E.g., People v. Lucky (1988) 45 Cal.3d 259, 302.) Whether a juror would come to the same conclusion, however, is another matter.

In the course of their analysis, the majority appear to suggest that if a factor is not vague, it necessarily passes muster under the United States Constitution, even if it "leave[s] the sentencer free to evaluate the evidence in accordance with his or her own subjective values." (Maj. opn., ante, at p. ___ [typed maj. opn. at p. 36].) Such a proposition would be too broad. The requirements imposed by the federal charter are substantive as well as formal. Thus, a factor, no matter how clearly defined, is constitutionally invalid if, for example, it authorizes or allows a juror to "attach[] the 'aggravating' label to" matters "that are constitutionally impermissible or totally irrelevant to the sentencing process, such as . . . the race, religion, or political affiliation of the defendant" or "to conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness." (Zant v. Stephens (1983) 462 U.S. 862, 885.)

With that said, I note that a successful Stringer challenge does not automatically result in reversal. As Stringer itself makes plain, an instruction incorporating a vague factor is subject to harmless-error analysis. (503 U.S. at pp. ___, ___ [112 S.Ct. at pp. 1137, 1140].) On this record, even if one or more of the factors defendant attacks are deemed vague, no prejudice appears.

In conclusion, having found no reversible error or other defect, I concur in the judgment.

MOSK, J.

C O P Y

PEOPLE v. PAUL PALALAUA TUILAEPA

S004786

CONCURRING OPINION BY KENNARD, J.

I concur in the result and the reasoning of the majority opinion except for its conclusion that, assuming we must evaluate the aggravating factors in Penal Code section 190.3 to determine whether they are impermissibly vague in violation of the Eighth Amendment, factor (i) ("the age of the defendant at the time of the crime") is not vague. I see no need to resolve this issue here. Because defendant's age played little role in either the evidence or the argument at the penalty phase, any vagueness in the trial court's instruction to the jury on factor (i) was harmless under any standard.

KENNARD, J.

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QUESTIONS PRESENTED

1. Did the California Supreme Court affirm the death judgment by relying on facts outside the record and without affording petitioner an opportunity to confront and brief the points, thereby violating due process and resulting in an arbitrary and capricious penalty determination?

2. Can California's Death Penalty statute reasonably be viewed as "vague" under Stringer v. Black?[1/]

3. Is certiorari warranted because of petitioner's claim that he was deprived of his constitutional rights due to the use of courtroom restraints?

4. Is certiorari warranted based on petitioner's assertion that his trial counsel's representation was inadequate?

1. Stringer v. Black, 503 U.S. ___, 112 S.Ct. 1130, 117 L. Ed. 2d 367 (1992).

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No. 93-5131

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

PAUL PALALAUA TUILAEPA, Petitioner,

v.

STATE OF CALIFORNIA, Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of California

BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

Petitioner, Paul Palalaua Tuilaepa, in forma pauperis, seeks review of the California Supreme Court's decision affirming his conviction and judgment of death in an opinion published as People v. Tuilaepa, 4 Cal. 4th 569, 842 P.2d 1142, 14 Cal. Rptr. 2d 340 (1992). A copy of the opinion is attached as Appendix A to petitioner's Petition for Writ of Certiorari.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner relies upon the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, pertinent parts of which are set forth at page 2 of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner was sentenced to death under the 1978 California Death Penalty Law following a jury trial in which petitioner was convicted of first degree murder, six counts of robbery, one count of attempted robbery, and two counts of assault with a firearm, and in which the jury found true a special circumstance[2] allegation that the murder occurred during the commission of a robbery. Cal. Penal Code § 190.2(a)(17)(i). On automatic appeal, the California Supreme Court affirmed the judgment and the penalty in its entirety. People v. Tuilaepa, 4 Cal. 4th 569, 842 P.2d 1142, 14 Cal. Rptr. 2d 340 (1992). A Petition for Writ of Habeas Corpus is currently pending in the California Supreme Court.[3]

STATEMENT OF FACTS

Petitioner's actions late in the afternoon of October 6, 1986, formed the basis for his murder, attempted robbery, robbery, and assault with a firearm convictions, and for the jury's findings that he murdered Melvin Whiddon in the course of robbery, and inflicted great bodily injury upon robbery victim Bruce Monroe and assault victims Kelvin Whiddon and Kenneth

2. A California defendant is not death-eligible absent a finding by the jury or trial judge, where a jury is waived, of one of a number of enumerated "special circumstances" listed in California Penal Code § 190.2.

3. The issue of courtroom shackling, which is raised by petitioner in three of his four arguments, infra, is raised by petitioner in the pending Petition for Writ of Habeas Corpus in the California Supreme Court.

Boone.[4] Clerk's Transcript on Appeal (hereinafter CT) at 208-12. At about 5:30 p.m. on October 6, 1986, as people gathered to watch Monday Night Football at the Wander Inn Bar in Long Beach, petitioner came in with a cohort. Petitioner screamed and pointed a rifle in the bartender's face, demanding money. Reporter's Transcript on Appeal (hereinafter RT) at 458-60.

Petitioner robbed six people at the bar and attempted to rob another bar patron. He shot and killed Melvin Whiddon, and shot and seriously wounded Whiddon's twin brother, Kelvin. Kelvin, who staggered to his brother's side and witnessed his brother's last breath, was in intensive care after petitioner's bullet went through Kelvin's side and a lung and exited by his spine. Petitioner shot Bruce Monroe in the stomach, after he turned his rifle toward Monroe's wife and Monroe stood in front of her. The bullet tore a hole through Monroe's kidney, liver, and an artery of his heart. The bullet then lodged against Monroe's spine and could not be removed. At trial, Monroe still wore a colostomy bag and lacked feeling in the top of his legs. As petitioner approached the back door of the bar, he looked at Kenneth Boone and smiled. He then aimed his rifle and shot Boone through the neck. The bullet struck Boone and exited the left side of his head. RT 460-532.

4. Respondent also refers this Court to the opinion of the California Supreme Court which thoroughly summarizes the facts developed at the guilt and penalty phases of petitioner's trial. Tuilaepa, 4 Cal. 4th at 577-81, 842 P.2d at 1145-48, 14 Cal. Rptr. 2d at 841.

At the penalty phase of petitioner's trial, the People introduced evidence of assaults, threats, and the possession of possible weapons while petitioner was at California Youth Authority, and of a robbery and assault committed by petitioner on August 3, 1987, while trial was ongoing in this case. RT 720-806.

Petitioner's penalty phase evidence consisted of the testimony of his mother, Meanoa Tuilaepa, his sister, Sanita Toufuli, and of clinical psychologist Michael Maloney. Petitioner's mother testified that petitioner, who was the youngest of 12 children all of whom were born in American Samoa, had been a "good boy" around the house and had done well in school. The family lived in Hawaii and then Long Beach, where petitioner, when he was about 15, met friends who were a "bad influence." Petitioner had helped take care of his brother Joe, who was in a wheelchair and lived at home because he had been shot in the back at a party. Petitioner's mother had tried, to the best of her ability, to teach petitioner right from wrong and the value of human life. Petitioner's sister testified that she and other relatives loved petitioner and were in court to support him. RT 808-21.

Clinical psychologist Michael Maloney gave petitioner a number of psychological tests, and testified that petitioner did not appear to be grossly disturbed, although he did appear to be depressed. His IQ was probably in the low 70's, placing him in the bottom five percent of the population. He had no neurologi-

cal disabilities and had sufficient intelligence to know right from wrong. RT 824-30.

SUMMARY OF REASONS WHY THE PETITION SHOULD BE DENIED

First, the California Supreme Court did not base its affirmance of the death judgment by relying on facts outside the trial record or denying petitioner an opportunity to confront and brief issues as to courtroom shackling. The reason the court rejected petitioner's appellate argument as to courtroom shackling was that petitioner failed to object and make a record as to this issue at trial, thereby waiving the claim on appeal. Tuilaepa, 4 Cal. 4th at 583-86, 842 P.2d 1142, 14 Cal. Rptr. 2d 340.

Second, California's 1978 Death Penalty Statute, namely California Penal Code § 190.3, is not vague in respect to factor (a), which refers to the circumstances of the crime, factor (b), which refers to petitioner's other violent criminal activity, and factor (i), which refers to the age of the defendant. California's death penalty scheme contains no factors which are vague such as the Mississippi factors found to be vague in Stringer v. Black, 503 U.S. ___, 112 S.Ct. 1130, 117 L. Ed. 2d 367 (1992). Even if applicable to California's penalty phase "aggravating factors," the reasoning of Stringer is inapposite to the instant case because factors (a), (b) and (i) direct the jury to specific and commonly understandable facts about petitioner

and his crime such that they are not "illusory" or impermissibly vague.

Third, even aside from the fact that the California Supreme Court rejected petitioner's shackling claim on the ground that he failed to object to the use of physical restraints, thereby waiving the claim, the trial record did not establish that the jury could see petitioner's restraints, and no prejudice was shown even assuming some jurors may have briefly caught a glimpse of ankle shackles as petitioner entered the courtroom.

Lastly, petitioner has made only a cursory assertion that his trial counsel's representation was inadequate, a claim which, as previously noted, is the subject of a pending Petition for Writ of Habeas Corpus in the California Supreme Court.

ARGUMENT

I

THE CALIFORNIA SUPREME COURT DID NOT BASE ITS AFFIRMANCE OF THE DEATH JUDGMENT AS TO THE ISSUE OF COURTROOM SHACKLING ON FACTS OUTSIDE THE RECORD OR DENY PETITIONER AN OPPORTUNITY TO BRIEF THE ISSUE

Petitioner contends that on the issue of whether there was justification for shackling at trial, the California Supreme Court relied upon declarations submitted by respondent in its response to the Petition for Writ of Habeas Corpus currently pending before the California Supreme Court, yet ignored evidence presented by petitioner by refusing to take judicial notice of two juror declarations on the question of whether jurors at trial could see petitioner in restraints. He concludes that this was an arbitrary and unusual deprivation of his ability to prosecute a meaningful appeal. Petition at 6-9. Petitioner's contention is without merit.

It is critical to note that although petitioner contends that the California Supreme Court resolved the shackling issue by relying on facts outside the trial record, in fact the court rejected the claim on the threshold basis that petitioner had failed to object at trial, thereby waiving the claim. Tuilaepa, 4 Cal. 4th at 583, 842 P.2d 1142, 14 Cal. Rptr. 2d 340.

It was upon this basis, founded solely upon facts within the record, that the California Supreme Court resolved the issue.

Thereafter, when addressing the predictable ineffective assistance of counsel claim based on trial counsel's failure to object, the California Supreme Court noted that (1) nothing in the record clearly established that the jury did or could see any restraints, (2) a post-trial record settlement hearing revealed that efforts had been taken to conceal ankle shackles from the jury whenever petitioner appeared in court, and (3) even assuming the jurors may have glimpsed petitioner in restraints as he entered the courtroom, this could not have shocked them or affected their assessment of the evidence. Tuilaepa, 4 Cal. 4th at 583-85, 842 P.2d 1142, 14 Cal. Rptr. 2d 340. In short, the notion that the court resolved the shackling issue by relying upon facts outside the trial record is simply incorrect. As such, petitioner's assertion that he did not have the opportunity to confront important points on the shackling issue because the court came to its conclusion by relying upon facts outside the record is groundless.

Moreover, the California Supreme Court reasonably refused to take judicial notice of two juror declarations on the question of the extent to which jurors may have glimpsed petitioner entering the courtroom in restraints. These matters were not the proper subject of judicial notice under California Evidence Code § 452(h), because the facts asserted in the declarations as to what jurors may have seen were subject to

dispute. Also, such documents are most appropriately considered in the Petition for Writ of Habeas Corpus currently pending before the California Supreme Court, as they are beyond the "four corners" of the trial record.

Lastly, it is unclear exactly what evidence "outside the record" petitioner claims was considered by the California Supreme Court. Petitioner claims that "the court refused to take judicial notice of petitioner's declarations but, [sic] incredibly relied upon statements in respondent's declarations which were neither before the court nor the subject of a judicial notice request. In fact the respondent did not want then [sic] before the court in the appeal. (Appendix A: 7, n.4.)" Petition at 7. It appears that petitioner is referring to page 17 rather than page 7 of the California Supreme Court's slip opinion, which petitioner attached to his petition as Appendix A. However, at that point in the opinion the court merely explained that it was refusing to grant petitioner's request to take judicial notice of two juror declarations, in part because the declarations were subject to dispute and thus were not the proper subject of judicial notice under California Evidence Code § 452(h). In that vein, the court was merely noting the disagreements between the declarants, as well as discrepancies between these declarations on the one hand and facts remembered by the court and counsel at the post-trial record correction and settlement hearing. The court was not ruling on the shackling issue. People v. Tuilaepa, 4 Cal. 4th at 595, 842 P.2d at 1152, 14 Cal. Rptr. 2d at 841.

Petitioner claims that the California Supreme Court quoted from trial counsel's declaration submitted by respondent in response to the Petition for Writ of Habeas Corpus currently pending before the California Supreme Court. Petition at 7-8. At most, however, petitioner has highlighted a factual error which was without significance to the resolution of the present case. As previously noted, the California Supreme Court decided the shackling issue in the first instance on the basis of petitioner's failure to object at trial to the use of courtroom restraints. The court did not decide the issue on the factual basis of counsel's recollections after trial as to the reasons for the use of courtroom restraints or their visibility to jurors.

Further, the factual error, in and of itself, consists of the following: While the evidence elicited at the post-trial hearing indicated that trial counsel recalled petitioner being a member of a gang called the "Sons of Samoa," recalled some mention of him being affiliated with the "East Side Longo" gang at one time, and recalled some concern with members of petitioner's family, including his brother, being present in court during the proceedings, RST 1018-19, the California Supreme Court's opinion recounted that counsel recalled "that defendant was thought to be dangerous and a flight risk during trial because he and a brother in attendance were gang members." Tuilaepa, 4 Cal. 4th at 582, 842 P.2d at 1149, 14 Cal. Rptr. 2d at 841. As noted earlier, neither this factual issue nor any

discrepancy underlying this question was the basis for the California Supreme Court's resolution of this issue. In fact, the California Supreme Court referred to trial counsel's recollection not in its analysis and disposition of the shackling issue, but rather in its "background" section preceding its analysis. Tuilaepa, 4 Cal. 4th at 582, 842 P.2d at 1149, 14 Cal. Rptr. 2d at 841. In short, the aspect of the California Supreme Court's disposition of the shackling issue to which petitioner refers is not factually significant, and most importantly it was not, in any event, the basis of the court's resolution of the matter.

In summary, petitioner's contention lacks merit. The California Supreme Court did not err, any assumed error was harmless, and in any event, certiorari would be inappropriate because petitioner's claim lacks broad importance and is not substantial, insofar as it rests upon the California Supreme Court's resolution of a factual question and application of California's Evidence Code.

II

CALIFORNIA'S DEATH PENALTY STATUTE

IS NOT VAGUE AS WRITTEN OR APPLIED

Petitioner claims that California's Death Penalty Statute is vague as written and applied in its failure to provide guidelines for the penalty decision in violation of the Eighth Amendment and Stringer v. Black, 503 U.S. ___, 112 S.Ct. 1130, 117 L. Ed. 2d 367. He argues that the California Supreme Court did not give careful consideration to the vagueness of three factors under California Penal Code § 190.3 which were used by the jury in making its penalty determination: factor (a), which refers to the circumstances of the crime; factor (b), which refers to petitioner's other violent criminal activity, and factor (i), which refers to the defendant's age. Petitioner concludes that the jury instructions were inadequate and the prosecutor's argument was inappropriate as to these three factors, and that the jury's penalty determination was therefore arbitrary and capricious. Petition at 10-14. Petitioner's assertions are meritless.

Petitioner's challenge to factors (a), (b), and (i) fails to warrant certiorari consideration because it does not present a substantial legal question requiring resolution by this Court. Moreover, the penalty determination was proper and just and was supported by appropriate aggravating factors.

First, as to the question of whether the jury was given guidance as to how to decide the criminality of other acts

committed by petitioner, the California Supreme Court reasonably explained that the trial court had no independent duty to instruct on the names and elements of crimes offered by the prosecution as to "other-crimes" under well-settled California law. For tactical reasons, defendants often do not want to risk highlighting prior violent crimes. The court also noted that petitioner was not prejudiced by the lack of an instruction describing or otherwise identifying prior violent crimes. Because of the convincing evidence of criminal conduct which was properly admitted under factor (b), there was no indication that an instruction on specific crimes and elements would have affected the outcome at trial. Tuilaepa, 4 Cal. 4th at 591-92, 842 P.2d 1142, 14 Cal. Rptr. 2d 340.

Regarding the question of whether factors (a), (b), and (i) were vague as written or applied, this assertion also has no merit. As to factor (b), which focuses the jury's attention on other crimes committed by petitioner involving his use or threatened use of force against another person, it is well settled that the "facts and circumstances of the defendant, his background, and his crime" are relevant to the sentencing decision. Clemons v. Mississippi, 494 U.S. 738, 748, 110 S.Ct. 1441, 108 L. Ed. 2d 725, 738 (1990). The state has broad latitude to decide how such facts are presented and considered at a penalty phase. Payne v. Tennessee, 501 U.S. ___, 111 S.Ct. 2597, 115 L. Ed. 2d 720, 735 (1991); Boyde v. California, 494 U.S. 370, 377, 110 S.Ct. 1190, 108 L. Ed. 2d 316, 326 (1990). It

is clear that the statute was not "vague" merely because the jury in the present case erroneously heard evidence of some prior acts inadmissible under factor (b). Factor (b) clearly directed the jury's attention to specific facts about petitioner. Although the California Supreme Court concluded that some evidence of unadjudicated acts of misconduct by petitioner were erroneously admitted under factor (b), obviously this does not render the statute itself unconstitutionally vague.

Further, petitioner's claim clearly lacks broad importance. The California Supreme Court concluded that notwithstanding some improper evidence of acts committed by petitioner, any error was harmless as "[t]he circumstances of the capital crime included defendant's attempt to kill four bar patrons in a gratuitous and cold-blooded manner. Admissible background evidence also showed a pattern of nonconforming and violent behavior, namely three assaults and the possession of potentially dangerous weapons while in custody." Tuilaepa, 4 Cal. 4th at 591, 842 P.2d 1142, 14 Cal. Rptr. 2d 340. Simply put, factor (b) is not "illusory" or "vague" under Stringer v. Black, 503 U.S. ___, 112 S.Ct. 1130, 117 L. Ed. 2d at 382, and the statute does not become vague merely because evidence was erroneously but nonprejudicially admitted under factor (b) to prove violent acts committed by petitioner.

Petitioner also claims that the age factor in California Penal Code § 190.3(i), is vague. Petition at 12-13. Certiorari should not be granted to consider his vagueness

challenge to factor (i) regarding petitioner's age at the time of the crime. Although mere chronological age by itself is irrelevant to the issue of penalty under California law, People v. Rodriguez, 42 Cal. 3d 730, 789, 726 P.2d 113, 230 Cal. Rptr. 667 (1986), either defense counsel or the prosecutor may argue age-related inferences which might "reasonably inform the choice of penalty." People v. Lucky, 45 Cal. 3d 259, 302, 753 P.2d 1052, 247 Cal. Rptr. 1 (1988). Here the prosecutor did not argue that petitioner's age in itself was aggravating, but merely argued, in anticipation of trial counsel's argument, that petitioner's age was not a mitigating factor.

Factor (i) was not impermissibly vague since it permitted argument only on "age-related matters suggested by the evidence or by common experience or morality. . . ." Lucky, 45 Cal. 3d at 303, 753 P.2d 1052, 247 Cal. Rptr. 1. The only requirement imposed upon the states is that the jury be allowed "to consider" the defendant's youth as a mitigating factor. See, e.g., Stanford v. Kentucky, 492 U.S. 361, 375, 109 S.Ct. 2969, 106 L. Ed. 2d 306 (1989); Lockett v. Ohio, 438 U.S. 586, 608, 98 S.Ct. 2954, 57 L. Ed. 2d 973 (1978); Thompson v. Oklahoma, 487 U.S. 815, 834, 108 S.Ct. 2687, 101 L. Ed. 2d 702 (1988); Johnson v. Texas, 509 U.S. ___, 61 U.S.L.W. 4738 (1993).

However, a mandate that the jury must be allowed "to consider" the mitigating force of a defendant's youth is not synonymous with a prohibition against the use, as aggravation, matters that interrelate case specific facts about the defendant

to his age, and certainly does not establish, as petitioner implies, a duty to order the jury to automatically accept a defendant's youth as a guaranteed factor in mitigation.

Lastly, factor (a), as to the circumstances of petitioner's crime, was not vague. Obviously jurors must exercise some subjective discretion. It would be impossible to have a totally objective penalty phase and, in fact, an automatic death scheme has been condemned as soundly as has an unbridled discretion scheme. See Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L. Ed. 2d 944 (1976). The California Supreme Court properly explained in the present case: "[T]he individualized penalty determination required by the Eighth Amendment makes inevitable application of the sentencer's own values, perceptions, and experiences to the factors the state properly deems relevant. (Eddings v. Oklahoma (1982) 455 U.S. 104, 110-112 [102 S.Ct. 869, 71 L. Ed. 2d 1, 8-9].)" Tuilaepa, 4 Cal. 4th at 594, 842 P.2d 1142, 14 Cal. Rptr. 2d 340. The California Supreme Court held in People v. Proctor, 4 Cal. 4th 499, 551, 842 P.2d 1100, 14 Cal. Rptr. 2d 340 (1992): "The United States Supreme Court itself has established that the circumstances surrounding a capital offense constitute one of the criteria upon which the jury should base its penalty determination. (See, e.g., Penry v. Lynaugh (1989) 492 U.S. 302, 318 [106 L.Ed.2d 256, 277-278, 109 S.Ct. 2934]; Booth v. Maryland (1987) 482 U.S. 496, 502 [96 L.Ed.2d 440, 448, 107 S.Ct. 2529], overruled on other grounds in Payne v. Tennessee (1991) ___ U.S.

___ [115 L.Ed.2d 720, 111 S.Ct. 2597]; Jurek v. Texas (1976) 428 U.S. 262, 274 [49 L.Ed.2d 929, 939-940, 96 S.Ct. 2950] (plur. opn.). The high court has not stated or implied that the factor of the 'circumstances of the offense' is unconstitutionally vague."

Moreover, petitioner's claims of vagueness as a whole should be rejected. In California, the jury must find true an enumerated California Penal Code § 190.2 "special circumstance" to render a defendant death-eligible. Once this has occurred, a penalty phase trial is held in which both parties submit evidence on enumerated California Penal Code § 190.3 aggravating and mitigating factors, examine and cross-examine witnesses, argue before the penalty phase jury, and wherein the jury is instructed on the pertinent law. Cal. Penal Code §§ 190.2, 190.3. The jury is instructed to impose a sentence of life without the possibility of parole if the mitigating factors outweigh the aggravating factors and death if the contrary is true. Cal. Penal Code § 190.3.

In Stringer, supra, the Mississippi scheme provided for a sentencing phase once the defendant was convicted of capital murder. There, however, the jury could return a death verdict if it found at least one of eight statutorily-established aggravating factors that was not outweighed by any mitigating circumstances. Stringer, 117 L. Ed. 2d 367 at 375, 112 S.Ct. 1130, 117 L. Ed. 2d 367. In Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L. Ed. 2d 372 (1988) a provision in an

Oklahoma statute identical to the Mississippi factor which involved a murder being "especially heinous, atrocious or cruel" was found to violate the Eighth Amendment. The core of the finding there was that the "especially heinous, atrocious or cruel" phrase failed to adequately inform juries "what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 (1972)." Id., 486 U.S. at 361-62, 108 S.Ct. 1853, 100 L. Ed. 2d 372.

In California, however, the safeguards are such that the record readily demonstrates (1) what evidence both sides proffered as establishing a mitigating or aggravating factor, (2) what arguments were relied upon by each side to establish or disprove the existence of any factor, and (3) the instructions to the jury as to how to assimilate the above information. The procedure renders it impossible for the jury to be ignorant of the meaning of the mitigating and aggravating factors actually litigated in any given case.

Further, although Eighth Amendment vagueness analysis is appropriate in reviewing state statutes that govern "those circumstances that make a criminal defendant 'eligible' for the death penalty," Lewis v. Jeffers, 497 U.S. 764, 110 S.Ct. 3092, 3099 (1990), in California the "special circumstance" findings made prior to the penalty phase "adequately limit[ ] the death sentence to a small subclass of capital-eligible cases." Pulley v. Harris, 465 U.S. 37, 53, 104 S.Ct. 871, 79 L. Ed. 2d 29

(1984). After death-eligibility has been so limited, even "unbridled discretion" in the jury is permissible under the Eighth Amendment. Zant v. Stephens, 462 U.S. 862, 875-80, 103 S.Ct. 2690, 77 L. Ed. 2d 214 (1983). Thus, any "vagueness" in the statutory sentencing factors weighed by a California jury in exercising its discretion whether to impose death is not cognizable under the Eighth Amendment. See California v. Ramos, 463 U.S. 992, 1008 n.22, 103 S.Ct. 3446, 77 L. Ed. 2d 1171 (1982). The set of factors identified in § 190.3 of the California Penal Code provides sufficient guidance to the jury and lessens the chance of arbitrary application of the death penalty, by focusing attention on aggravation related to the defendant's personal history and by identifying relevant individualized mitigating circumstances. See Pulley v. Harris, 465 U.S. at 53, 104 S.Ct. 871, 79 L. Ed. 2d 29.

Petitioner cites this Court's grant of certiorari in Bacigalupo v. California, ___ U.S. ___, 113 S.Ct. 32, 121 L. Ed. 2d 5 (1992) on the question of vagueness. The Bacigalupo grant and remand does not support granting the instant petition. This Court remanded Bacigalupo for consideration in light of Stringer v. Black, supra. As previously noted, Stringer undertook vagueness analysis of an "aggravating factor" as defined in Mississippi's death-penalty statute, observing that "a vague aggravating factor used in the weighing process . . . creates a risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the

existence of an illusory circumstance." Stringer, 503 U.S. ___, 112 S.Ct. at 1139, 117 L. Ed. 2d 367. The factors cited by petitioner, specifically factor (a), regarding the circumstances of petitioner's crime, factor (b), regarding petitioner's other acts, and factor (i), regarding petitioner's age cannot be deemed "illusory" circumstances.

In Arave v. Creech, ___ U.S. ___, 113 S.Ct. 1534, 121 L. Ed. 2d ___ (1993), this Court held that an aggravating circumstance that the defendant exhibited "utter disregard for human life" as construed by the Idaho Supreme Court to refer to the "cold blooded, pitiless slayer" was not facially invalid. This Court explained that in light of Idaho's sentencing scheme, a sentencing judge reasonably could find that not all Idaho capital defendants are "cold-blooded." This Court reversed the decision of the Court of Appeals which had found that the special circumstance was unconstitutionally vague, as this Court concluded that in light of the consistent narrowing definition given the "utter disregard" circumstance by the Idaho Supreme Court, the circumstance was constitutional. Arave, ___ U.S. ___, 113 S.Ct. at 1536-37, 121 L. Ed. 2d ___.

Moreover, as pointed out earlier, the Mississippi "aggravating factor" functioned as a "narrowing" factor rendering the defendant death-eligible in the first place, the very kind of factor traditionally subject to vagueness analysis. In contrast, the California "aggravating factor" plays a role only after the "special circumstance" findings have rendered the defendant

eligible for the death penalty.

In summary, Stringer does not compel Eighth Amendment vagueness analysis of the aggravating and mitigating factors that guide a California capital jury's discretion in imposition of sentence. The California statute scheme is not unconstitutionally vague. There is no need to grant certiorari to consider petitioner's vagueness challenge.

III

PETITIONER'S DEATH JUDGMENT WAS NOT CONSTITUTIONALLY INVALID BECAUSE OF COURTROOM SHACKLING

Petitioner reiterates his claim, made in his first contention, that he was improperly shackled at trial. Petition at 15-17. This contention lacks broad importance such that certiorari is inappropriate. The court resolved the shackling issue on the independent state law ground that petitioner could not challenge the use of physical restraints at trial for the first time on appeal, having failed to object and make a record at trial and having thereby waived the claim.

Further, although the issue is before the California Supreme Court in a currently pending Petition for Writ of Habeas Corpus, the record on appeal simply did not establish that (1) the jury saw courtroom restraints, (2) the efforts of the court and counsel to conceal ankle shackles from the jury whenever petitioner appeared in court failed, or (3) any glimpse jurors may have had of restraints as petitioner entered the courtroom actually shocked them or affected their assessment of the evidence. See Tuilaepa, 4 Cal. 4th at 583-86, 842 P.2d 1142, 14 Cal. Rptr. 2d 340. Petitioner has wholly failed to show a violation of the Constitution or a substantial legal question warranting the grant of certiorari.

IV

PETITIONER'S CONCLUSORY CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL DOES NOT WARRANT THE GRANT OF CERTIORARI

Petitioner briefly claims that his federal constitutional rights to due process, effective assistance of counsel, and to be free from an arbitrary and capricious death judgment were violated by the inadequate representation of trial counsel, who failed to protect petitioner from unwarranted and prejudicial shackling in front of the jury. Petition at 17-18. Again, as previously noted, the shackling issue does not warrant the grant of certiorari. Moreover, the California Supreme Court explained in this automatic appeal that the performance of trial counsel as to the use of courtroom restraints "could not possibly have affected the outcome at trial." Tuilaepa, 4 Cal. 4th at 583, 842 P.2d 1142, 14 Cal. Rptr. 2d 340. The court held:

> "Nothing in the record on appeal clearly establishes that the jury did or could see defendant's restraints. The court and counsel agreed that efforts had been taken to conceal defendant's ankle shackles from the jury whenever he appeared in court. Defendant's post-trial 'experiment' did not conclusively show efforts had failed. Defendant's version of events also implied, at most, that jurors might have seen him handcuffed and/or shackled in the

hallway of the courthouse and might have assumed such restraints were not removed during trial. However, the trial court made no findings in this regard and never credited defendant's account. In addition, defendant did not testify at any phase of trial and there is no indication he would have testified but for the restraints." People v. Tuilaepa, 4 Cal. 4th at 584, 842 P.2d 1142, 14 Cal. Rptr. 2d 340.

Petitioner has simply failed to show that any error by trial counsel on the issue of shackling constituted either deficient performance or prejudice, i.e., that there is a reasonable probability that, but for trial counsel, the result of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 695-96, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). Beyond that, again as noted earlier petitioner's claim lacks broad importance and does not articulate the kind of substantial legal question worthy of a grant of certiorari.[5]

---

5. As pointed out in Argument I, petitioner's allegation of ineffective assistance of counsel currently is before the California Supreme Court in a pending Petition for Writ of Habeas Corpus, in which petitioner has gone beyond the "four corners" of the trial record and addressed, inter alia, the issue of courtroom restraints.

CONCLUSION

Petitioner presents no issue worthy of discretionary review by this Court. The Petition for Writ of Certiorari therefore should be denied.

DATED: September 2, 1993.

Respectfully submitted,

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No. 93-5131

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

PAUL PALALAUA TUILAEPA, Petitioner,

v.

THE STATE OF CALIFORNIA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

(SUPPLEMENTAL)

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8 pp

QUESTION PRESENTED

V. Petitioner was denied a fair trial in violation of Cage v. Louisiana because his jury was instructed concerning reasonable doubt in such a way that it was permitted to judge his culpability based upon vague and unidentifiable moral notions instead of based upon evidence produced in court.

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NEW INTERVENING MATTER

On Friday, October 1, 1993, while out of town in San Francisco, counsel for petitioner heard that on September 28, 1993, this court had granted certiorari in Sandoval v. California, 92-9049, as well as in Victor v. Nebraska, 92-8894, regarding the validity of the "reasonable doubt" instructions in California and Nebraska, as they incorporate the concept of "moral certainty."[1] The Tuilaepa jury was instructed in the words of the California jury instruction statute, Penal Code § 1096. With the exception of one inconsequential word, the Sandoval and the Tuilaepa juries were instructed identically regarding reasonable doubt.[2]

---

[1]As framed by petitioner in Sandoval that issue is:

> "I. Was petitioner deprived of due process and a fair jury trial by the use of constitutionally defective reasonable doubt instructions which invited the jury to base its verdict on improper "moral" considerations rather than on an evidentiary evaluation? (Cage v. Louisiana, 498 U.S. 39 (1990); Sullivan v. Louisiana, 508 U.S. ___, 124 L.Ed.2d (June 1, 1993).)

Sandoval v. California, supra, Petition, p.i.

[2]The Tuilaepa jury was instructed in the exact words of the statute:

> "The defendant in a criminal action is presumed to be innocent until the contrary is proved. And in the case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the state ["people" was used in Sandoval instead of "state"] the burden of proving guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the

A. THE CONSTITUTIONAL DEFECTS IN THE CALIFORNIA REASONABLE DOUBT INSTRUCTION[3]

1. Petitioner's due process rights under Cage v. Louisiana, 498 U.S. 39, 112 L.Ed.2d 339 (1990), have been violated

In Cage, the court condemned the use of the term "moral certainty" in place of "evidentiary certainty." The nub of the problem was, and is, that the jury should be deciding the guilt of a defendant based upon evidence or evidentiary considerations, and not by using some unknowable moral grid which would surely vary from juror to juror.

2. The unconstitutional aspects of the instruction

First, the instruction is ambiguous, indeed unintelligible, when it states to the jury the following concerning what reasonable doubt is not, "it is not a mere possible doubt; because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt." Surely if 12 persons were asked to write down in a sequestered manner their definition of "moral evidence," the responses would wildly vary.

Second, and likewise, the use later in the instruction of the term "moral certainty" tends to cloud the difference between judging petitioner's conduct by statutory elements of a crime based upon trial evidence, including testimony, as opposed to judging

---

charge."
(RT 3:636-7)

[3]In view of the duplicate nature of the Sandoval and Tuilaepa instructions, the previously granted certiorari in that matter, as well as the shortness of time, petitioner utilizes the arguments briefed in Sandoval, though in a more summary form.

that conduct based upon some unknown, and unknowable, moral scheme personal to each individual juror.

B. STANDARD IS REVERSIBLE PER SE

Instructional error regarding the reasonable doubt instruction has been held by the court to be reversible per se because of the effect of such misdirection and error on the deliberations and verdicts of a jury. Sullivan v. Louisiana, 508 U.S. ___, 124 L.Ed.2d 182, 190.

CONCLUSION

Therefore, it is urged that the court grant petitioner's writ of certiorari on this new intervening matter.

Dated: October 5, 1993
6:30 p.m.

Respectfully submitted,

HOWARD W. GILLINGHAM
Attorney for Petitioner
PAUL PALALAUA TUILAEPA

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 4370 Tujunga Avenue, Suite 105, North Hollywood, California 91604.

On October 6, 1993, I served the foregoing document described as ** on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

Clerk of the Court
California Supreme Court
303 2nd Street, South Tower
San Francisco, CA 94107-1317

Patrick T. Brooks, Esq. (ALSO FAXED AT 9:00 A.M., 10/6/93)
Deputy Attorney General
300 South Spring Street
5th Floor
Los Angeles, CA 90013

Paul Tuilaepa
Box D67900
Tamal, CA 94974

_X__ (BY MAIL)

As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at North Hollywood, California, in the ordinary course of business. I am aware that on motion of the parties served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on October 6, 1993, at North Hollywood, California.

I declare under penalty or perjury under the laws of the State of California that the above is true and correct.

HOWARD W. GILLINGHAM
Declarant

BEST AVAILABLE COPY

QUESTION PRESENTED

1. Is certiorari appropriate in light of this Court's grant of certiorari in Sandoval v. California, 92-9049, where petitioner failed to preserve the issue presented in Sandoval by presenting the claim to the California Supreme Court?

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NO. 93-5131

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

PAUL PALALAUA TUILAEPA, Petitioner,

v.

STATE OF CALIFORNIA, Respondent.

On Petition for Writ of Certiorari
To The Supreme Court of California

BRIEF OF RESPONDENT IN OPPOSITION TO SUPPLEMENTAL PETITION

OPINION BELOW

Petitioner, Paul Palalaua Tuilaepa, in forma pauperis, seeks review of the California Supreme Court's decision affirming his conviction and judgment of death in an opinion published as People v. Tuilaepa, 4 Cal. 4th 569, 842 P.2d 1142, 14 Cal. Rptr. 2d 340 (1992). A copy of the opinion was attached as Appendix A to petitioner's Petition for Writ of Certiorari.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has relied upon the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, pertinent

parts of which were set forth at page 2 of his Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner was sentenced to death under the 1978 California Death Penalty Law following a jury trial in which he was convicted of first degree murder, six counts of robbery, one count of attempted robbery, and two counts of assault with a firearm, and in which the jury found true a special circumstance allegation[1/] that the murder occurred during the commission of a robbery. Cal. Penal Code 190.2(a)(17)(i). On automatic appeal, the California Supreme Court affirmed the judgment and the penalty in its entirety. People v. Tuilaepa, 4 Cal. 4th 569, 842 P.2d 1142, 14 Cal. Rptr. 2d 340 (1992). A Petition for Writ of Habeas Corpus is currently pending in the California Supreme Court.

Petitioner filed a Petition for Writ of Certiorari in the present case on July 8, 1993, and respondent filed a Brief in Opposition on September 3, 1993. Petitioner has filed a Supplemental Petition for Writ of Certiorari in light of this Court's grant of certiorari in Sandoval v. California, 92-9049, on September 28, 1993.

---

1. A California defendant is not death-eligible absent a finding by the jury or trial judge, where a jury is waived, of one of a number of enumerated "special circumstances" listed in California Penal Code § 190.2.

SUMMARY OF REASONS WHY THE SUPPLEMENTAL PETITION SHOULD BE DENIED

Petitioner failed to preserve his claim that the State of California's reasonable doubt instruction, CALJIC No. 2.90, was unconstitutional by presenting this claim to the California Supreme Court.

ARGUMENT

I

PETITIONER'S ASSERTION THAT THE JURY WAS IMPROPERLY INSTRUCTED ON REASONABLE DOUBT IS NOT PROPERLY BEFORE THE COURT AND MUST BE REJECTED BECAUSE PETITIONER DID NOT PRESENT THE CLAIM TO THE CALIFORNIA SUPREME COURT

Noting that this Court granted certiorari in Sandoval v. California, 92-9049, and in Victor v. Nebraska, 92-8894, on September 28, 1993, on the issue of these states' reasonable doubt instructions, petitioner has filed a Supplemental Petition for Writ of Certiorari. Petitioner urges this Court to grant his supplemental petition on the basis of this "new intervening matter." He points out that the jury in the present case, like the jury in Sandoval v. California, was instructed pursuant to CALJIC No. 2.90, and asserts that this Court should therefore grant certiorari to consider his contention as well. Supplemental Petition at 1-3.

Petitioner's contention is without merit. Petitioner's contention suffers from the critical flaw that he failed to present the claim to the California Supreme Court. Petitioner did not assert, either on appeal or in his petition for writ of habeas corpus, that the jury in the present case was improperly instructed on reasonable doubt. Under well-settled case authority his present contention is not properly before the Court. Illinois v. Gates, 462 U.S. 213, 217 (1983); Exxon Corporation v. Eagerton, 462 U.S. 176, 181, n.3 (1983); Hill v. California, 401 U.S. 797,

805 (1971); Beck v. Washington, 369 U.S. 541, 553 (1962). Unlike the circumstances in Sandoval v. California, 92-9049, in which the California Supreme Court was presented with and actually considered the reasonable doubt instruction at issue, People v. Sandoval, 4 Cal. 4th 155, 841 P.2d 862, 14 Cal. Rptr. 2d 342 (1992), petitioner's contention was neither presented to nor decided by the California Supreme Court. People v. Tuilaepa, 4 Cal. 4th 569, 842 P.2d 1142, 14 Cal. Rptr. 2d 340 (1992). His Supplemental Petition for Writ of Certiorari therefore cannot be entertained by this Court.

CONCLUSION

Petitioner's contention, not having been presented to or considered by the California Supreme Court, is not properly before this Court. His Supplemental Petition therefore should be denied.

Dated: October 29, 1993.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of the State of California

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Chief Assistant Attorney General

CAROL WENDELIN POLLACK
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Supervising Deputy Attorney General

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September 14, 1993

William K. Suter
Clerk of the Supreme Court
Supreme Court of the United States
Washington, D.C. 20543

RE: Paul P. Tuilaepa v. State of California
Court No. 93-5131

Dear Mr. Suter:

Enclosed are the original and 40 copies of the Brief of Respondent in Opposition to Supplemental Petition for Writ of Certiorari in the above-entitled matter.

Also enclosed is a copy of this letter and a copy of the cover of the brief. Would you please stamp these copies in your usual manner to show that the above documents were received in your office and return them to the undersigned deputy attorney general in the metered, self-addressed envelope. Thank you.

Sincerely,

DANIEL E. LUNGREN
Attorney General

Shirley A. Callin per

PATRICK T. BROOKS
Deputy Attorney General

PTB:sac
Enclosures

NO. 93-5131

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

PAUL PALALAUA TUILAEPA, Petitioner,

v.

STATE OF CALIFORNIA, Respondent.

PROOF OF SERVICE UNDER RULE 29.5 (C)

I F. MITCHELL, declare as follows:

I am over 18 years of age, and not a party to the within cause; my business address is 300 South Spring Street, Los Angeles, California 90013;

I served one copy of the BRIEF OF RESPONDENT IN OPPOSITION TO SUPPLEMENTAL PETITION in the above entitled case on each of the following persons:

Howard W. Gillingham
Attorney at Law
4370 Tujunga Avenue, Suite 105
North Hollywood, California 91604
(818) 763-4775
[Counsel of Record for P. Tuilaepa]

by placing same in an envelope(s) addressed to the post office address of each said person(s), and by sealing and then depositing each said envelope, on NOV 0 1 1993, in the United States mail at Los Angeles, California, with first-class postage thereon fully prepaid;

I thereby have served all parties required to be served;

I declare under penalty of perjury that the foregoing is true and correct.

Executed on NOV 0 1 1993, at Los Angeles, California.

F. Mitchell
Declarant

F. MITCHELL

Supreme Court, U.S.
FILED
JAN 19 1994

No. 93-5131

In The

Supreme Court of the United States

October Term, 1993

PAUL PALALAUA TUILAEPA,

Petitioner,

vs.

CALIFORNIA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of California

JOINT APPENDIX

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Petition for Certiorari Filed July 8, 1993
Certiorari Granted December 6, 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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Penalty Phase – Jury Returns Death Verdict	August 14, 1987
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[833] LONG BEACH, CALIFORNIA; WEDNESDAY, AUGUST 12, 1987;

3:10 P.M.

DEPARTMENT SOUTH "G" HON. ELSWORTH M. BEAM, JUDGE

(APPEARANCES AS HERETOFORE NOTED.)

THE COURT: GOOD MORNING, LADIES AND GENTLEMEN. MR. SLICK.

MR. SLICK: REST.

THE COURT: ANYTHING FURTHER?

MR. HODGMAN: NO.

THE COURT: WE REVIEWED THE JURY INSTRUCTIONS. ARE YOU READY TO COMMENCE CLOSING ARGUMENT?

MR. HODGMAN: I AM, YOUR HONOR.

MR. SLICK: I'M READY.

THE COURT: ALL RIGHT.

MR. HODGMAN, [sic] YOU MAY PROCEED.

MR. HODGMAN: THANK YOU, YOUR HONOR.

OPENING ARGUMENT

BY MR. HODGMAN:

YOUR HONOR, FELLOW COUNSEL.

GOOD MORNING, LADIES AND GENTLEMEN OF THE JURY.

THIS MORNING, THERE WILL BE NO FIRE ORATION FROM ME.

THERE WILL BE NO FIRE AND BRIMSTONE, NO COURTROOM THEATRICS OR DRAMATICS.

QUITE SIMPLY THIS IS NOT THE TIME NOR IS [834] IT THE PLACE FOR IT.

I'VE THOUGHT QUITE A BIT ABOUT THIS MOMENT FOR QUITE SOMETIME.

FOR QUITE SOMETIME I KNEW PERHAPS I WOULD HAVE TO STAND IN FRONT OF YOU TODAY AND I'D HAVE TO TALK ABOUT CERTAIN UNPLEASANT THINGS, AND I KNEW THAT I WOULD BE ASKING OF YOU THAT YOU RETURN A VERDICT OF DEATH AS TO THE DEFENDANT IN THIS CASE, MR. TUILAEPA.

IN FACT, I'M GOING TO ASK A LITTLE BIT MORE THAN THAT.

I'M GOING TO EXPLAIN TO YOU WHY THAT VERDICT, THAT IS, THE VERDICT OF DEATH, IS REALLY LEGALLY AND IN LIGHT OF THE EVIDENCE THAT HAS BEEN PRESENTED IN THIS CASE THE ONLY RIGHT AND APPROPRIATE VERDICT THAT SHOULD BE RENDERED BY YOU IN THIS CASE.

AND I WANT YOU TO KNOW THIS IS NOT AN EASY THING FOR ME TO DO.

I'VE THOUGHT ABOUT THIS A LITTLE BIT, AND I'VE THOUGHT ABOUT HOW IN LIFE THERE ARE

REALLY VERY FEW OCCASIONS WHEN ONE IS CALLED UPON TO DEAL WITH A LIFE OR DEATH ISSUE, THAT IS, TO CONFRONT DEATH.

IN WAR, PERHAPS, YOU HAVE TO CONFRONT DEATH.

FOR CERTAIN OF OUR PEACE OFFICERS, AS THEY REPRESENT, IN EFFECT, THAT THIN LINE BETWEEN THE CRIMINAL ELEMENT AND OUR SOCIETY IN THE LAWABIDING ASPECT OF SOCIETY, PERHAPS SOMETIMES THEY HAVE TO FACE DEATH. PERHAPS THEY HAVE THOSE DECISIONS.

[835] PERHAPS DOCTORS IN EMERGENCY ROOMS DEALING WITH A SUDDEN MEDICAL CRISIS HAVE TO DEAL WITH THOSE SAME ISSUES AND SEE THE QUICK PASSING OF LIFE BEFORE THEM, AND THAT IS TRAGIC.

BUT, AS I'VE THOUGHT ABOUT THIS CASE, I'VE THOUGHT ABOUT WHAT I COULD SAY TO YOU THIS MORNING.

I THOUGHT THERE WAS ANY GREATER WISDOM OR GREATER INSIGHT THAT I COULD GIVE TO YOU.

AND THE MORE I THOUGHT ABOUT IT, THE MORE I THOUGHT PROBABLY NOT.

THAT PROBABLY AS YOU SIT HERE NOW, THE ANSWER WITH REGARD TO THIS QUESTION THIS RATHER LARGE QUESTION IS ALREADY WITHIN YOU.

AND I HAVE A FEELING AND I TRUST THAT AS YOU WORK TOGETHER TO ARRIVE AT A FAIR AND

APPROPRIATE VERDICT AT THIS PHASE OF THE CASE, THAT YOU WILL ARRIVE AT THE APPROPRIATE RESULT, THAT YOUR COLLECTIVE WISDOM, YOUR COLLECTIVE INPUT WILL GUIDE YOU TO THAT APPROPRIATE RESULT.

AND THIS IS NOT AN EASY THING FOR YOU.

IN THIS CASE, YOU AS JURORS HAVE HAD TO CONFRONT DEATH AS WELL.

YOU HAVE HAD TO CONFRONT DEATH INITIALLY IN THIS CASE DURING THE GUILT PHASE PORTION OF THE CASE.

YOU HEARD, AS PRESENTED THROUGH THE TESTIMONY OF QUITE A FEW WITNESSES, ABOUT THE VIOLENT MURDER OF A MAN IN A BAR LAST OCTOBER.

[836] YOU ALSO HEARD ABOUT THE NEAR VIOLENT MURDER OF THREE OTHER MEN AS WELL.

IT WAS THAT CLOSE TO BEING FOUR DEAD BODIES THERE AT THE WANDER INN BAR.

AND YOU HAVE TO CONFRONT THIS ISSUE JUST AS YOU HAVE TO CONFRONT THE SAME ISSUE HERE AT THE PENALTY PHASE OF THE CASE.

NOW, IT'S A LITTLE BIT DIFFERENT FOR YOU.

YOU HAVE DETERMINED THAT THE DEFENDANT IS GUILTY OF FIRST DEGREE MURDER.

YOU HAVE DETERMINED THAT THE SPECIAL CIRCUMSTANCE IS TRUE.

AND YOU HAVE DETERMINED THAT THE OTHER COUNTS THAT WERE CHARGED AGAINST THE DEFENDANT ARE TRUE AS WELL, THAT, IN EFFECT, THE DEFENDANT IS GUILTY OF THOSE AS WELL.

BUT JUST THE SAME, YOU HAVE TO CONFRONT THE ISSUE OF LIFE OR DEATH ONCE AGAIN.

AND I THINK IT'S IMPORTANT TO RECOGNIZE AS YOU DO THIS THAT THERE ARE PEOPLE IN THIS SOCIETY WHO DO NOT VALUE HUMAN LIFE PERHAPS AS YOU OR I DO.

THAT'S ONE REASON WHY THIS PHASE OF THE CASE IS PERHAPS A LITTLE DIFFICULT FOR ALL OF US, BECAUSE GENERALLY, AS HUMAN BEINGS, WE VALUE HUMAN LIFE.

WE EMBRACE LIFE.

WE ALL HOPE TO LIVE LONG AND FULFILLING LIVES.

[837] AND AS YOU KNOW FROM THIS CASE, MELVIN WHIDDON DID NOT HAVE THAT OPPORTUNITY.

AND HE DIDN'T GET THAT OPPORTUNITY BECAUSE OF THE INDIVIDUAL WHO IS CHARGED HAD THIS CASE, PAUL TUILAEPA, IS NOT THE SORT OF PERSON WHO VALUES HUMAN LIFE, AND THAT EVIDENCE HAS SHOWN THAT.

HE DOESN'T EMBRACE LIFE IN THE SAME SENSE AND REGARD IT IN THE SAME HIGH ESTEAM, [sic] THE SAME HIGH VALUE THAT YOU AND I DO AND THE EVIDENCE SHOWS NOW, I CAN RECALL FROM

THE FIRST MOMENTS IN THIS CASE WHEN I ADDRESSED YOU, AND I TALKED TO YOU IN MY OPENING STATEMENT ABOUT WHAT HAPPENED IN THE WANDER INN BAR ON THE NIGHT OF OCTOBER THE SIXTH, 1986.

I GAVE YOU AN OVERVIEW OF WHAT OCCURRED.

AND ON SOME OF YOUR FACES, I COULD SEE THE SHOCK REGISTER.

ON SOME OF YOUR FACES, I SAW WHAT APPEARED TO BE ALMOST DISBELIEF, THAT IS, HOW CAN SOMETHING THIS HORRIBLE HAPPEN.

IT'S A SENSELESS, RANDOM TRAGEDY.

IT COULD HAVE BEEN ANY ONE OF US IN A BAR, MONDAY NIGHT FOOTBALL. SOMETHING AS INNOCENT AS THAT, GOING TO WATCH MONDAY NIGHT FOOTBALL IN A BAR IN THE FALL TURNING INTO AN ABSOLUTE BLOOD BATH.

AND THE THING IS, IT HAPPENED.

THESE SORTS OF THINGS DO HAPPEN IN OUR SOCIETY.

AND FROM THE EVIDENCE IN THIS CASE, YOU [838] KNOW IT HAPPENED, AND YOU HAVE DETERMINED THAT THIS DEFENDANT, PAUL TUILAEPA, IS RESPONSIBLE FOR THAT.

SO NOW YOU TURN TO THIS PHASE OF THE CASE, TO THE PENALTY PHASE OF THE CASE, AND IT'S UP TO YOU JURORS TO DECIDE COLLECTIVELY

WHAT IS THE APPROPRIATE PENALTY, WHAT IS JUSTIFIED AND APPROPRIATE IN YOUR EYES AND MOST PARTICULARLY AS WELL IN THE EYES OF THE LAW.

BECAUSE, WHEN YOU TOOK THE OATH TO BECOME JURORS IN THIS CASE, YOU TOOK AN OATH TO FOLLOW THE LAW.

JUDGE BEAM WILL TELL YOU WHAT THE LAW IS WITH REGARD TO THIS PHASE OF THE CASE, AND I'M GOING TO MENTION IT BRIEFLY TO YOU THIS MORNING.

BUT IT'S IMPORTANT FOR YOU TO FOLLOW THE LAW, AND IT TAKES A LITTLE BIT OF MORAL COURAGE ON YOUR PART TO DO THAT, TO FOLLOW THE LAW.

YOU WILL WRESTLE WITH CERTAIN EMOTIONS IN THAT JURY ROOM, BUT ULTIMATELY, YOUR DECISION HAS TO COME DOWN TO THIS: IN THE EYES OF THE LAW AND IN LIGHT OF THE EVIDENCE AND THE LAW THAT JUDGE BEAM GIVES YOU, IS YOUR VERDICT THE APPROPRIATE ONE.

SO, I AM GOING TO TURN MY ATTENTION RIGHT NOW TO THE LAW JUST A LITTLE BIT.

I'M GOING TO ACQUAINT YOU WITH A PORTION OF ONE INSTRUCTION.

AFTER I DO THIS, I'M GOING TO DISCUSS SOME OF THE EVIDENCE THAT IS PERTINENT TO THIS PARTICULAR [839] INSTRUCTION.

BUT THIS LITTLE PASSAGE THAT I'M ABOUT TO READ TO YOU IS PRETTY MUCH THE ESSENCE OF THE CASE.

THIS IS THE FUNDAMENTAL ISSUE THAT CONFRONTS YOU AT THIS PHASE OF THE CASE.

YOU WILL BE TOLD ABOUT VARIOUS FACTORS IN AGGRAVATION AND VARIOUS FACTORS IN MITIGATION.

AND IN WEIGHING THOSE VARIOUS CIRCUMSTANCES, YOU DETERMINE UNDER THE RELEVANT EVIDENCE WHICH PENALTY IS JUSTIFIED AND APPROPRIATE BY CONSIDERING THE TOTALITY OF THE AGGRAVATING CIRCUMSTANCES WITH THE TOTALITY OF THE MITIGATING CIRCUMSTANCES.

TO RETURN A JUDGMENT OF DEATH, EACH OF YOU MUST BE PERSUADED THAT THE AGGRAVATING EVIDENCE IS SO SUBSTANTIAL IN COMPARISON WITH THE MITIGATING CIRCUMSTANCES THAT IT WARRANTS DEATH INSTEAD OF LIFE WITHOUT POSSIBILITY OF PAROLE.

SO, WHAT THIS FORMULA INVOLVES, THEN, IS A COMPARISON, A COMPARISON OF THE EVIDENCE THAT WAS PRESENTED IN AGGRAVATION WITH THE EVIDENCE THAT WAS PRESENTED IN MITIGATION.

AND THIS IS THE TEST THAT YOU WILL USE AS YOU FOLLOW THE LAW AND ARE GUIDED TO A JUST VERDICT IN THIS CASE.

AND I'LL TELL YOU RIGHT NOW QUITE CANDIDLY, THIS IS NOT AN ARBITRARY OR MECHANICAL FORMULA.

[840] YOU JURORS DETERMINE WHAT WEIGHT TO GIVE TO EACH ITEM OF EVIDENCE THAT WAS PRESENTED, WHETHER I PRESENTED IT OR MR. SLICK PRESENTS IT.

BUT ULTIMATELY THE 12 OF YOU WILL HAVE TO DETERMINE THE RELATIVE SCALE OF THE TWO, THE RELATIVE WEIGHT AND CONVINCING FORCE OF ALL ASPECTS OF THE EVIDENCE.

AND IF YOU FIND THAT THE AGGRAVATING EVIDENCE SUBSTANTIALLY OUTWEIGHS THE MITIGATING EVIDENCE, THEN YOU ARE DUTYBOUND TO RETURN BY LAW A VERDICT OF DEATH AS TO THIS DEFENDANT.

SO, I'D LIKE TO TALK FOR A FEW MINUTES ABOUT THE NATURE OF THE EVIDENCE THAT WAS PRESENTED IN THE PENALTY PHASE OF THIS CASE AS WELL AS THE CASE THROUGHOUT.

JUDGE BEAM WILL TELL YOU THAT, AS YOU CONSIDER WHAT PENALTY SHOULD BE APPLIED IN THIS PARTICULAR CASE, YOU ARE TO CONSIDER THE EVIDENCE THAT WAS PRESENTED IN THE GUILT PHASE OF THE CASE AS WELL AS THE EVIDENCE THAT WAS PRESENTED IN THE PENALTY PHASE OF THE CASE.

SO TURNING TO WHAT MIGHT POSSIBLY BE ARGUED BY MR. SLICK AS EVIDENCE IN MITIGATION.

AND SOMETHING THAT I'M SURE HE WILL ASK OF YOU THAT IS SO COMPELLING THAT IT REALLY OUTWEIGHS THE AGGRAVATING EVIDENCE.

BY MY CALCULATION, I CAN THINK OF ABOUT FOUR THINGS THAT MIGHT BE ARGUED.

[841] ONE THING, FIRST OFF, WOULD BE THE DEFENDANT'S APPARENT AGE.

FROM THE TESTIMONY, IT'S APPARENT THAT THE DEFENDANT IS ABOUT IN HIS EARLY TWENTIES, AND I SUPPOSE AN ARGUMENT COULD BE MADE, WELL, THE DEFENDANT IS TOO YOUNG TO HAVE THE DEATH PENALTY IMPOSED UPON HIM.

WELL, IT'S UP TO YOU TO DETERMINE WHAT WEIGHT TO GIVE TO THAT PARTICULAR FACTOR.

BUT I'D LIKE YOU TO CONSIDER A COUPLE OF THINGS, IF THAT ARGUMENT IS MADE TO YOU, AND TO TEMPER THE THRUST THE [sic] OF THAT ARGUMENT IF IT IS MADE WITH THE FOLLOWING CONSIDERATIONS:

THE DEFENDANT, PAUL TUILAEPA, IS OLD ENOUGH AT THIS POINT IN TIME TO HAVE SPENT SOMETIME INCARCERATED.

AND YOU KNOW FROM THE EVIDENCE THAT FOR AT LEAST FOUR YEARS WITHIN RECENT MEMORY HE HAS BEEN IN THE CUSTODY OF THE CALIFORNIA YOUTH AUTHORITY, 1982, 1984, 1985, 1986.

SO, IN A CRIMINAL SENSE, HE HAS A CERTAIN MATURITY WHICH BELIES THE NUMBER OF YEARS, PERHAPS, THAT HE HAS BEEN ON THE FACE OF THIS EARTH.

SECONDLY, I WANT YOU TO THINK ABOUT THE FACT THAT THE DEFENDANT WAS OLD ENOUGH TO

DECIDE TO PLAN AS WELL AS COMMIT A ROBBERY, TO BREAK THE LAW TO COMMIT A FELONY OFFENSE.

HE HAD ENOUGH MATURITY, ENOUGH [842] SOPHISTICATION TO PLAN AND EXECUTE THIS FELONY TYPE OFFENSE, A ROBBERY.

AND NOT ONLY THAT, IN THE EXECUTION OF THIS ROBBERY, THE DEFENDANT, IN EFFECT, EXECUTED MAN, A HUMAN BEING.

AND THINK ABOUT THAT ROBBERY, THINK ABOUT WHAT HE DID.

WE'VE DISCUSSED OPTIONS THAT HE MAY HAVE HAD AT THE TIME, BUT JUST IN TERMS OF WHAT YOU KNOW HE DID.

HE TOOK THAT RIFLE AND HE DECIDED TO FIRE IT, NOT ONCE, NOT TWICE, NOT THREE TIMES, BUT FOUR TIMES.

FOUR TIMES THE DEFENDANT SQUEEZED THAT TRIGGER, AND FOUR TIMES A LITTLE HUNK OF LEAD, A LITTLE LEAD PROJECTILE WENT SPINNING OUT THE END OF THAT RIFLE AIMED AND TARGETED AT A HUMAN BEING.

THE OTHER ASPECT OF THIS CASE, MR. SLICK TALKED ABOUT, IT WAS ONLY A .22, ONLY A .22, AND YET YOU SAW THE DAMAGE THAT THAT LITTLE HUNK OF LEAD CAN CAUSE.

YOU KNOW WHAT IT DID TO EACH OF THE FOUR VICTIMS WHO WERE ON THE RECEIVING END OF THE LEAD PROJECTILE IN EACH INSTANCE.

THAT BULLET TORE THROUGH FLESH, IT RIPPED APART ARTERIES. IT TORE THROUGH INTERNAL ORGANS SUCH AS LUNGS AND KIDNEYS.

YOU KNOW WHAT DAMAGE IT DID. FOUR HUMAN [843] BEINGS FELT THE IMPACT OF THIS DEFENDANT'S GUNSHOTS.

FOUR HUMAN BEINGS FELT THE PAIN OF BEING SHOT WITH A GUN.

FOUR HUMAN BEINGS, UPON BEING HIT BY A BULLET, HAD TO WONDER, AM I GOING TO LIVE OR AM I GOING TO DIE.

AND YOU KNOW THE NATURE OF THE WOUNDS, THESE WERE ALL SERIOUS, LIFE-THREATENING WOUNDS.

AND YOU KNOW IN THE CASE OF MELVIN WHIDDON, HE DID DIE. HE WAS KILLED BY THIS DEFENDANT.

AND THE OTHERS, BRUCE MONROE, KELVIN WHIDDON, KEN BOONE, WERE ALL DARN LUCKY THAT THEY DID NOT DIE AS WELL.

SO, AS YOU THINK ABOUT THE DEFENDANT'S AGE, THINK ABOUT WHAT HE DID.

AND I SUBMIT TO YOU, LADIES AND GENTLEMEN, YOU CAN'T PASS THIS OFF AS THE MERE FOLLY OF YOUTH.

AGE IS NOT AN EXCUSE.

DEFENDANT, IN THIS CASE, IS OLD ENOUGH TO BE HELD ACCOUNTABLE FOR WHAT HE DID, AND I

SUBMIT TO YOU HE MADE THE DECISION TO KILL, AND IN LIGHT OF THAT, HE IS A FIT SUBJECT TO FACE THE DEATH PENALTY.

ANOTHER FACTOR THAT MIGHT BE RAISED BY MR. SLICK WOULD BE WITH REGARD TO DR. MALONEY'S TESTIMONY.

THE APPARENT PURPOSE OF DR. MALONEY'S TESTIMONY WAS TO TELL YOU THAT THE DEFENDANT IN THIS CASE APPARENTLY HAS A SUBNORMAL IQ.

[844] WELL, AGAIN, I LEAVE IT TO YOU TO DETERMINE WHAT WEIGHT THAT FACT SHOULD HAVE IN LIGHT OF ALL THE TOTALITY OF THE EVIDENCE THAT'S BEEN PRESENTED TO YOU.

BUT, AGAIN, TEMPER THAT EVIDENCE WITH THESE CONSIDERATIONS:

THE DEFENDANT APPARENTLY HAS NO ORGANIC BRAIN DAMAGE AS TESTIFIED TO BY DR. MALONEY.

NO NEUROLOGICAL DISIF YOU KNOW /SHUPB.

HE HAS A LOW IQ.

BUT HE HAS SUFFICIENT INTELLIGENCE TO KNOW RIGHT FROM WRONG.

IT DOESN'T TAKE A GENIUS TO KNOW RIGHT FROM WRONG.

IT DOESN'T TAKE A GENIUS TO KNOW THAT IT'S WRONG TO BREAK THE LAW, THAT IT'S WRONG TO

ROB SOMEONE, THAT IT'S WRONG TO KILL SOMEONE IN THE FASHION THAT MR. TUILAEPA DID IN THIS CASE.

HE HAD SUFFICIENT INTELLIGENCE TO FUNCTION IN LIFE.

AND I SUBMIT TO YOU THE FACT OF AN APPARENT SUBNORMAL IQ CARRIES VERY LITTLE WEIGHT IN THIS ANALYTICAL PROCESS THAT YOU'RE ENGAGED IN.

THERE'S ANOTHER FACTOR AS WELL THAT COULD BE RAISED, AND YOU ARE TO CONSIDER ANY FACT THAT WAS PRESENTED BY THE EVIDENCE IN THE GUILT PHASE WHICH MIGHT SERVE AS AN EXTENUATING CIRCUMSTANCE WHICH SOMEHOW MIGHT TEND TO EXCUSE A LITTLE BIT THE [845] DEFENDANT'S BEHAVIOR DESPITE THE FACT THAT YOU HAVE FOUND HIM GUILTY OF THESE CRIMES, SOMETHING THAT DOESN'T AMOUNT TO A LEGAL DEFENSE WHICH EXTENUATES OR EXCUSES WHAT HE DID JUST A LITTLE BIT.

I WOULD EXPECT IN THIS VEIN AN ARGUMENT COULD BE MADE THAT MELVIN WHIDDON WOULD BE ALIVE TODAY HAD HE NOT PUNCHED THE OTHER ROBBER, THAT SOMEHOW MELVIN WHIDDON SET THE STAGE FOR HIS OWN DEMISE.

WITH REGARD TO THAT, WE'VE DISCUSSED THAT A LITTLE BIT IN THE GUILT PHASE OF THIS CASE.

TALKED ABOUT THE DEFENDANT HAD A PANOPLY OF NON-DEADLY ALTERNATIVES AVAILABLE

TO HIM WHEN HE WENT OVER TO CONFRONT MELVIN WHIDDON AND THE OTHERS IN THAT BAR.

HE COULD HAVE BRANDISHED THE RIFLE. HE COULD HAVE VERBALLY THREATENED. HE COULD HAVE FIRED INTO THE GROUND. HE COULD HAVE FIRED INTO THE CEILING, BUT HE DID NOT.

HE SHOT MELVIN WHIDDON.

AND TO AFFIX THE FOCUS OF THIS EVENT, OF MELVIN WHIDDON PUNCHING THE OTHER ROBBER, AS AN EXTENUATING CIRCUMSTANCE, I SUBMIT TO YOU IS TAKING THE PROPER FOCUS AWAY FROM THE DEFENDANT AND PLACING IT UPON A VICTIM, AND THAT'S NOT RIGHT.

MELVIN WHIDDON DIDN'T ASK TO DIE THAT NIGHT.

HE CERTAINLY DIDN'T WANT TO GET SHOT.

IT WAS THE DEFENDANT WHO MADE THAT [846] DECISION FOR HIM.

IT WAS THE DEFENDANT WHO FIRED THAT SHOT WHO MADE THE DECISION TO KILL MELVIN WHIDDON, AND MELVIN WHIDDON DIED, AS YOU KNOW, ON THE SIDEWALK OUTSIDE THE BAR OF THE WANDER INN ON PACIFIC AVENUE LAST OCTOBER.

HE DIDN'T GO TO THE BAR WANTING THAT.

THE DEFENDANT MADE THAT DECISION.

THE DEFENDANT KILLED HIM.

SO, IF THIS ARGUMENT IS RAISED, BARE [sic] IN MIND THE PROPER FOCUS IS NOT UPON WHAT MELVIN WHIDDON DID, BUT UPON WHAT THE DEFENDANT DID LAST NIGHT.

THE DEFENDANT WAS THE ONE WHO KILLED, THE ONE WHO SHOT AT [sic] UNARMED INNOCENT MAN IN A BAR THAT NIGHT.

LASTLY, IT COULD BE ARGUED THAT YOU SHOULD IMPOSE LIFE WITHOUT POSSIBILITY OF PAROLE UPON THE DEFENDANT OUT OF SYMPATHY FOR THE DEFENDANT, PERHAPS EVEN EXTENDING THAT, OUT OF SYMPATHY FOR HIS FAMILY.

HIS FAMILY HAS BEEN HERE THROUGHOUT THE TRIAL IN APPARENT SUPPORT OF THE DEFENDANT, HAVE HAD A CHANCE TO LOOK AT HIM ALMOST EVERY DAY OF THE TRIAL.

HIS MOTHER TESTIFIED. HIS SISTER TESTIFIED.

I THINK IT WOULD BE QUITE NATURAL FOR YOU TO FEEL SOME SYMPATHY, TO HAVE SOME FEELING FOR THE DEFENDANT'S MOTHER AS WELL AS THE SISTER.

I THINK THAT IS THAT'S [sic] NATURAL.

[847] THE PROBLEM IS, THOUGH, WITH REGARD TO THE DEFENDANT, IS HE DESERVING, BASED UPON THE EVIDENCE, OF THAT SAME SYMPATHY OF, OF THAT SAME MERCY YOU CAN FEEL FOR MRS. TUILAEPA AND HIS DAUGHTER.

BUT AT THE SAME TIME, YOU HAVE TO SEGREGATE AND DISCRIMINATE THE [sic] BETWEEN THE

DEFENDANT AND WHAT HE DID AND WHAT HIS FAMILY TESTIFIED TO.

ONE THING TO NOTE ABOUT THEIR TESTIMONY IS THIS:

THE DEFENDANT CANNOT CAST THE BLAME FROM HIS OWN SHOULDERS, CAST THAT RESPONSIBILITY UPON PARENTAL NEGLECT OR UPON NEGLECTFUL SOCIETY.

HIS MOTHER TESTIFIED TO THE BEST OF HER ABILITY. SHE TRIED TO INSTILL THE PROPER VALUES IN LIFE UPON THE DEFENDANT.

THE DEFENDANT'S SISTER APPARENTLY GREW UP IN THE SAME ENVIRONMENT, IN THE SAME HOUSEHOLD, AND SHE HAS GONE ON TO BECOME EDUCATED, TO HAVE HER OWN FAMILY.

BY ALL APPEARANCES, WE CAN INFER THAT SHE IS A LAWABIDING CITIZEN.

SO, THE DEFENDANT CANNOT THROW THE BLAME FROM HIMSELF ON TO HIS PARENTS OR UPON SOCIETY.

HE HAS TO SHOULDER THAT BLAME HIMSELF.

HE DID THOSE THINGS IN THE BAR, AND HE IS THE ONE THAT HAS TO STAND ACCOUNTABLE.

SO YOU CAN FEEL FOR THE DEFENDANT'S MOTHER.

[848] YOU CAN FEEL FOR HIS SISTER.

YOU CAN FEEL FOR THE REST OF THE FAMILY.

BUT, THE DEFENDANT IS NOT DESERVING OF YOUR SYMPATHY.

HE'S NOT DESERVING, QUITE SIMPLY, BECAUSE OF WHAT HE DID.

MR. SLICK MAY TALK ABOUT OTHER THINGS, BUT I'M GOING TO LEAVE THAT TO HIM.

I WANT TO TURN FOR A FEW MINUTES TO THE OTHER SIDE OF THE CASE, AT LEAST THIS PHASE OF THE CASE, AND THAT IS THE PENALTY PHASE EVIDENCE AND THE EVIDENCE THAT WAS PRESENTED IN AGGRAVATION.

THE EVIDENCE IN AGGRAVATION THAT WAS PRESENTED TO YOU REALLY FALLS INTO TWO CATEGORIES.

CATEGORY NUMBER ONE IS THE FACTS AND CIRCUMSTANCES OF THE CRIMES FOR WHICH YOU HAVE FOUND THE DEFENDANT GUILTY.

THE SECOND CATEGORY RELATES TO CERTAIN BEHAVIOR, CRIMINAL TYPE BEHAVIOR IN THE PAST THAT REFLECTS EITHER VIOLENCE INHERENTLY OR THE IMPLICATION OF VIOLENCE BY WAY OF THREAT, AND THIS GETS INTO THE VARIOUS REPRESENTATIVES FROM THE CALIFORNIA YOUTH AUTHORITY WHO CAME AND TESTIFIED FOR YOU.

THEY GAVE YOU SOME INSIGHT INTO THE DEFENDANT'S BACKGROUND ASIDE FROM WHAT THE DEFENDANT GAVE YOU.

AND THIS INSIGHT, STARTING WITH THIS LATTER CATEGORY FIRST, IS VERY REVEALING.

[849] WE HAD A NUMBER OF THINGS THAT OCCURRED OUT THERE IN THE CALIFORNIA YOUTH AUTHORITY AS WELL AS IN THE LOCK-UP PORTION OF THIS COURTHOUSE WHILE YOU WERE BEING SELECTED AS JURORS TO HEAR THIS CASE.

AND THERE IS A COMMON THREAT THAT RUNS THROUGHOUT ALL OF THIS PENALTY PHASE EVIDENCE THAT WAS PRESENTED TO YOU.

THE COMMON THREAT IS THIS:

ALL OF THESE EVENTS OCCURRED WHILE THE DEFENDANT WAS IN [sic] INCARCERATED, WHILE HE WAS IN CUSTODY.

AND I WANT TO HAVE YOU PAUSE FOR A MOMENT AND THINK ABOUT IT, BECAUSE THERE IS A TENDENCY TO FEEL THAT MERELY BECAUSE SOMEONE IS IN THE YOUTH AUTHORITY OR IN JAIL, THEY'RE OUT OF SITE, [sic] THEY'RE OUT OF MIND.

IT'S LIKE THEY FALL OFF THE FACE OF THE EARTH.

AND THAT'S ONLY BECAUSE FROM YOUR PERSPECTIVE IN A FREE AND OPEN NON-INCARCERATED SOCIETY, THAT IS TRUE.

WE DON'T SEE THE PEOPLE WHO ARE INCARCERATED.

BUT THE FACT IS, THEY'RE THERE, BUT MERELY IN A DIFFERENT TYPE OF SOCIETY.

THEY ARE IN AN INCARCERATED SOCIETY.

AND IN AN INCARCERATED SOCIETY, YOU CAN HAVE WHAT WAS REVEALED TO YOU DURING THE PENALTY PHASE [850] OF THIS CASE.

YOU CAN HAVE OTHER INMATES WHO ARE AS VICTIMS AS MUCH AS YOU OR I, ANOTHER INMATE WHO CAN BE ASSAULTED, ANOTHER INMATE WHO CAN BE ROBBED.

AND THAT WAS DEMONSTRATED TO YOU IN THE EVIDENCE.

IN FACT, SOME OF THE TESTIMONY DISCLOSED THAT THIS DEFENDANT, EVEN WHILE IN THE PRESENCE OF HIS GUARDS AND WHILE HANDCUFFED, STILL HAD THE CAPACITY TO STRIKE OUT AND ASSAULT BY MEANS OF KICKING ANOTHER INMATE.

THAT GIVES YOU SOME INSIGHT INTO THE TYPE OF PERSON THIS DEFENDANT IS.

IN ADDITION, IN THIS INCARCERATED SOCIETY, YOU SEE NOT ONLY INMATES CAN BE VICTIMS, BUT THE STAFF MEMBERS AT THE INSTITUTION CAN BE VICTIMS AS WELL.

AND THAT WAS EVIDENCED BY VIRTUE OF THE THREATS THAT WERE MADE, THE THREATS TO KILL BY THE DEFENDANT TO VARIOUS INDIVIDUALS WHOM YOU NOW KNOW THROUGH THE TESTIMONY.

SO NOT ONLY CAN HE ACTUALLY ASSAULT, HE CAN THREATEN TO KILL WHILE STILL IN CUSTODY.

THIRD ELEMENT, IT WAS DEMONSTRATED FOR YOU THROUGH THE TESTIMONY OF ONE OF THE WITNESSES, THAT ON ONE OCCASION THE DEFENDANT HAD IN HIS POSSESSION SOME RAZOR BLADES.

AND YOU RECALL THE DETAILS OF THAT. I DON'T HAVE TO BELABOR THAT POINT, AND AS TO HOW MANY [851] RAZOR BLADES HE'S SUPPOSED TO HAVE AND IN WHAT CONDITION.

THE POINT IS, I DON'T THINK IT TAKES ANY GREAT LEAP OF IMAGINATION TO CONTEMPLATE WHY THE DEFENDANT HAD THOSE RAZOR BLADES IN THAT CONDITION AND WHAT POTENTIAL FOR INJURY, IF NOT DEATH TO SOMEONE ELSE, THOSE BLADES REPRESENT.

IT'S AN INFERENCE, AND I'LL LEAVE IT AS TO THAT.

BUT THE POINT IS A RAZOR BLADE IN AN INCARCERATED SOCIETY CAN BECOME A DEADLY AND DANGEROUS WEAPON.

THESE THINGS EXIST IN THIS SOCIETY. IT'S A SEPARATE SOCIETY. IT'S SEPARATE AND APART FROM OUR OWN, AND YET AS WE KNOW FROM THE EVIDENCE, SHANKS CAN EXIST, MATCH BOMBS CAN EXIST, RAZOR BLADES. IT'S ALL PART OF THAT SOCIETY.

IT MAY NOT BE YOU OR I WHO IS VICTIMIZED, BUT IT CAN BE STAFF MEMBERS AND OTHER INMATES.

NOW, I'D LIKE YOU TO THINK ABOUT ONE OTHER THING WITH REGARD TO SOME OF THIS AGGRAVATING EVIDENCE THAT I PRESENTED TO YOU BY WAY OF THE YOUTH AUTHORITY REPRESENTATIVES.

YOU CAN INFER THAT THE DEFENDANT WENT TO THE YOUTH AUTHORITY CERTAINLY, AND YOU CAN INFER THAT HE GOT OUT, BECAUSE HE WAS IN A COMMISSION POSITION TO COMMIT THIS CRIME ON OCTOBER 6, 1986.

BUT LET'S THINK ABOUT WHAT THAT STAY IN [852] THE YOUTH AUTHORITY MEANT.

AGAIN, LET'S DIG A LITTLE BIT DEEPER INTO THE EVIDENCE AND REALIZE WHAT THAT MEANT.

AS ONE OF THE WITNESSES TESTIFIED, THE YOUTH AUTHORITY IS FOR THE PROTECTION OF SOCIETY AS WELL AS THE TREATMENT OF THE YOUTHS.

AS YOU HEARD FROM THE EVIDENCE, THERE ARE HOSPITALS OUT THERE. THERE ARE SCHOOLS, OPPORTUNITY TO LEARN A TRADE.

SO THIS DEFENDANT GETS OUT OF THE YOUTH AUTHORITY, AND BY INFERENCE, YOU CAN ANSWER THE FOLLOWING QUESTIONS YOURSELVES:

DID HE BENEFIT FROM THE YOUTH AUTHORITY?

DID HE LEARN HIS LESSON FROM THE YOUTH AUTHORITY?

DID HE BECOME A LAWABIDING CITIZEN?

AND YOU ALREADY KNOW THE ANSWERS TO THOSE QUESTIONS, AND YOU KNOW WHAT HE DID ON OCTOBER 6, 1986.

THAT WAS THE IMPACT THAT HAD.

AND WE CAN TAKE THAT EVEN A STEP FURTHER, BECAUSE THERE IS A CERTAIN DISRESPECT FOR THE LAW. THERE IS CERTAIN ANTI-SOCIAL BEHAVIOR HERE TO AN EXTREME DEGREE WHICH IS AT PLAY, AND THAT IS EVIDENCED BY WHAT HAPPENED IN THIS VERY COURTHOUSE ON AUGUST THE 3RD WHILE YOU JURORS WERE BEING SELECTED AND WHILE THIS DEFENDANT IS ON TRIAL FOR HIS LIFE.

AND WHAT DOES HE DO?

[853] WELL, YOU HAD THE TESTIMONY OF MR. CHATTERS. MR. CHATTERS MAY NOT HAVE BEEN THE MOST IMPRESSIVE INDIVIDUAL, BUT HE QUITE SIMPLY IN HIS OWN FASHION TOLD YOU WHAT HAPPENED TO HIM, AND IN SORT OF A GUTTURAL BRUTAL SENSE, HE WAS PUNCHED OUT AND ROBBED OF HIS MONEY RIGHT HERE IN THE COURTHOUSE, RIGHT HERE IN THE LOCK-UP, RIGHT HERE BEHIND JAIL BARS.

THAT'S WHAT THIS DEFENDANT DID, AND THAT SHOULD INDICATE SOMETHING TO YOU AS WELL ABOUT THE NATURE OF THIS DEFENDANT AND THE SUBJECT OF THE PENALTY THAT YOU DEEM APPROPRIATE.

I'D LIKE TO TURN FOR A MOMENT AWAY FROM THIS ASPECT OF THE AGGRAVATING EVIDENCE AND TURN TO THE OTHER ASPECT OF THE AGGRAVATING EVIDENCE THAT WAS PRESENTED TO YOU.

AS JUDGE BEAM WILL TELL YOU A LITTLE LATER THIS MORNING, YOU ARE TO CONSIDER IN DETERMINING THIS ISSUE OF LIFE WITHOUT PAROLE OR DEATH THE CIRCUMSTANCES OF THE CASE ITSELF.

AND I REALLY HAVE ONLY THIS POINT TO MAKE ABOUT THAT. I'M NOT GOING TO BELABOR WHAT HAPPENED IN THE BAR, BUT I'D LIKE TO MAYBE POINT OUT WHAT DID HAPPEN, AND THAT IS THIS:

THE EVENTS THAT OCCURRED IN THAT BAR AND THE EVENTS THAT YOU FOUND THE DEFENDANT GUILTY OF IN AND OF THEMSELVES SO SUBSTANTIALLY OUTWEIGH ANY OF THE MITIGATING EVIDENCE THAT WAS PRESENTED IN THIS CASE, THAT EVEN IF IT WERE JUST THOSE EVENTS ALONE, [854] THE DEATH PENALTY WOULD BE THE APPROPRIATE VERDICT.

AND WHY DO I SAY THIS?

THERE ARE CERTAIN OBVIOUS THINGS ABOUT WHAT HAPPENED IN THE BAR, BUT I WANT YOU TO THINK ABOUT THIS AS WELL.

I TOUCHED UPON IT IN MY GUILT PHASE ARGUMENT, BUT I THINK IT'S IMPORTANT TO IMPRESS UPON YOU ONCE AGAIN, AND THAT'S THIS:

FOUR PEOPLE WERE SHOT, AND YOU KNOW THE NATURE AND LOCATION OF ALL THE WOUNDS THAT EACH OF THOSE INDIVIDUALS SUFFERED.

AND QUITE FRANKLY, NOT THROUGH ANY ACTIONS OF THE DEFENDANT ALONE, IT IS JUST THROUGH SHEER GOOD LUCK, PROMPT MEDICAL ATTENTION, AND PERHAPS THE GRACE OF GOD THAT WE DON'T HAVE FOUR DEAD HUMAN BEINGS ON THE FLOOR OF THE WANDER INN BAR THAT NIGHT.

YOU HEARD THEM DESCRIBE THEIR WOUNDS.

IN MOST INSTANCES, WITH REGARD TO KELVIN WHIDDON, BRUCE MONROE, KEN BOONE, A MATTER OF MILLIMETERS IN DEVIATION OF THE PATH OF THE BULLET WOULD HAVE KILLED THEM.

THEY WERE THAT CLOSE TO DEATH, AND THE DEFENDANT IN THIS CASE WAS THAT CLOSE TO HAVING THE BLOOD OF FOUR HUMAN BEINGS ON HIS HANDS.

AND THAT IS SOMETHING YOU SHOULD CONSIDER AS AN AGGRAVATING CIRCUMSTANCE.

AS MUCH AS WHAT HAPPENED – WHAT ALMOST HAPPENED. WE WERE THAT CLOSE TO THAT SCENARIO WITH [855] FOUR DEAD BODIES, AND THAT QUITE SIMPLY, IS HORRENDOUS.

AND THAT'S WHY I SAY, BASED UPON THAT ALONE, THE AGGRAVATING EVIDENCE OF WHAT HAPPENED IN THAT BAR THAT NIGHT AND WHAT ALMOST HAPPENED SUBSTANTIALLY OUTWEIGHS

WHATEVER MITIGATING EVIDENCE WAS PRESENTED.

LADIES AND GENTLEMEN, I'M JUST ABOUT DONE. I'VE JUST ABOUT CONCLUDED MY REMARKS, AND THERE'S A COUPLE OF THINGS I'D LIKE TO SAY.

FIRST OF ALL, UNLIKE THE GUILT PHASE OF THIS CASE, I'M ONLY GOING TO SPEAK TO YOU ONCE TODAY.

THERE WILL BE NO REBUTTAL.

WHATEVER I HAVE TO SAY, I'M GOING TO SAY RIGHT NOW AND THAT'S IT.

SO YOU WILL NOT HEAR ME GET UP ONCE AGAIN TO ADDRESS YOU.

WITH RESPECT TO THIS KIND OF ISSUE, AGAIN, I FEEL ALREADY THE ANSWER TO SOME EXTENT IS ALREADY WITHIN YOU.

IT'S THE TYPE OF THING I'M SURE YOU HAVE THOUGHT ABOUT, AND I'M SURE YOU'RE READY TO DELIBERATE ABOUT TOGETHER, AND QUITE SIMPLY THERE'S NOT MUCH MORE I CAN SAY TO GIVE YOU ANY ADDED INSIGHT INTO HOW TO RESOLVE THE ISSUE.

THE SECOND THING I'D LIKE TO TALK ABOUT IS SOMETHING MR. SLICK I'M SURE WILL TALK ABOUT, AND THAT IS, LIFE WITHOUT POSSIBILITY OF PAROLE IS A BAD ENOUGH [856] PENALTY.

AND HE'S GOING TO SAY THAT TO YOU.

HE GOING TO SAY, I'M SURE, SOMETHING LIKE, LIFE WITHOUT POSSIBILITY OF PAROLE IS A HORRIBLE THING TO THINK ABOUT. YOU'RE GOING TO SPEND THE REST OF YOUR NATURAL DAYS IN A LITTLE EIGHT-BY-TEN CELL, SIX-BY-TEN, WHATEVER IT IS AT A PRISON, AND IN THAT CELL, THERE'S A TOILET, THERE'S KIND OF AN AWFUL LITTLE BED, MAYBE A SINK, MAYBE A MIRROR, AND NOT MUCH ELSE, AND THE DEFENDANT, PAUL TUILAEPA, WILL TURN 30 IN PRISON, 40, 50, WHO KNOWS AFTER THAT.

BUT THE REST OF HIS NATURAL DAYS WILL BE IN PRISON.

AND WITH REGARD TO THAT, I'D LIKE TO HAVE YOU TEMPER THAT THOUGHT WITH JUST A COUPLE OF THINGS.

FIRST OF ALL, THE CELL TO WHICH MELVIN WHIDDON IS NOW CONFINED IS A LOT SMALLER THAN THAT, AND THAT CELL IS UNDER THE GROUND, AND MELVIN WHIDDON IS NOT GOING TO HAVE THE BENEFIT OF LIVING OUT THE NATURAL DAYS. THE REST OF HIS NATURAL DAYS WERE TAKEN FROM HIM.

SO, WHEN I SAY LIFE WITHOUT POSSIBILITY OF PAROLE, IT'S A SERIOUS PENALTY, AND I GRANT YOU THAT, IT IS SERIOUS.

IT IS A VERY STIFF PENALTY, BUT IT IS NOT ENOUGH IN THIS CASE. IT IS NOT THE APPROPRIATE PENALTY.

AND BY APPLYING THE LAW AND THE EVIDENCE, [857] I THINK YOU TOO, WILL SEE IT SIMPLY IS NOT APPROPRIATE IN THIS PARTICULAR CASE.

BUT THERE IS MORE THAN THAT.

THERE IS ANOTHER THING I'D LIKE TO HAVE YOU THINK ABOUT WHEN MR. SLICK SAYS LIFE WITHOUT POSSIBILITY OF PAROLE IS BAD ENOUGH, IT'S SEVERE ENOUGH PENALTY.

I'D LIKE TO HAVE YOU ASK YOURSELVES THE QUESTION WHY DID THIS DEFENDANT SMILE JUST BEFORE HE SHOT KENNETH BOONE.

AN ODD PIECE OF EVIDENCE, SOMETHING THAT STUCK OUT IN MY MIND. I'M SURE IT HAD AN IMPACT ON YOURS AS WELL.

BUT I'D LIKE YOU TO THINK ABOUT THAT, BECAUSE AGAIN IT GIVES YOU A LITTLE BIT MORE INSIGHT TO HIM AND WHY LIFE WITHOUT POSSIBILITY OF PAROLE IS NOT ENOUGH IN THIS CASE.

AT THE POINT IN TIME PAUL TUILAEPA SMILED, JUST BEFORE HE BACKED OUT THE BACK DOOR OF THE WANDER INN BAR, HE HAD ALREADY SHOT DOWN THREE PEOPLE, AND YOU KNOW THE CIRCUMSTANCES OF HOW HE SHOT THEM DOWN.

AND AS HE STOOD THERE IN THE BACK OF THE BAR WITH THAT RIFLE IN HIS HANDS, KEN BOONE, AS YOU KNOW FROM THE DIAGRAM, WAS OFF TO HIS LEFT.

KEN BOONE POSED NO THREAT, HAD NO WEAPON, AND IF ANYTHING, WAS JUST TRYING TO

MELT INTO THE WOODWORK IN LIGHT OF WHAT HAPPENED.

AND YET TUILAEPA TURNS TO HIM, SMILES, AND [858] THEN SHOOTS HIM THROUGH THE NECK.

WHAT DOES THAT SMILE SIGNIFY?

DOES IT SIGNIFY REMORSE ON THE PART OF MR. TUILAEPA FOR WHAT HE HAD DONE IN SHOOTING THE OTHER THREE INDIVIDUALS?

DOES IT SIGNIFY THAT HE WAS SORRY FOR WHAT HE DID?

WHY SMILE? WHY DO THAT? WHY SHOOT KEN BOONE?

SO, THEN YOU THINK ABOUT SOME OF THESE THINGS THAT MR. SLICK WILL RAISE, THINK ABOUT THE SMILE, THE SMILE IN THIS CASE OF A KILLER.

QUITE LASTLY, WHEN YOU THINK ABOUT LIFE WITHOUT POSSIBILITY OF PAROLE, I WANT YOU TO BE MINDFUL, ONCE AGAIN, OF WHAT IT REPRESENTS.

THE DEFENDANT WILL NOT FALL OFF THE FACE OF THE EARTH. HE WILL BE OUT OF SIGHT PERHAPS EVEN OUT OF MIND. YOU CAN FORGET ABOUT HIM PERHAPS.

BUT HE STILL IS IN A SOCIETY. HE'S IN A DIFFERENT TYPE OF SOCIETY, AN INCARCERATED SOCIETY, A SOCIETY WHERE THE POPULATION RATHER THAN LAWABIDING CITIZENS ARE CRIMINALS AND INMATES, BUT A SOCIETY, NONETHELESS.

AND YOU KNOW FROM THE EVIDENCE HOW, IN THE PAST, THE DEFENDANT REACTED IN AN INCARCERATED SOCIETY.

PLEASE CONSIDER THAT AS YOU DELIBERATE AT THIS PHASE OF THE CASE.

[859] IN CLOSING, JUST A FEW LAST THINGS.

ONE IS PLEASE EXTEND TO MR. SLICK THE SAME COURTESY AND ATTENTIVENESS THAT YOU'VE EXTENDED TO ME THIS MORNING. I APPRECIATE THAT, AND I APPRECIATE THE SAME QUALITIES THAT YOU'VE EXHIBITED THROUGHOUT THE TRIAL.

IT HAS MOVED QUICKLY, PERHAPS INTENSELY, BUT JUST THE SAME, I THANK YOU FOR EXHIBITING THOSE QUALITIES.

SECONDLY, I WANT YOU TO THINK ABOUT YOUR OATH AS JURORS.

WHEN YOU RAISED YOUR HAND TO TAKE THAT OATH, IT AT THE TIME WAS SOMETHING YOU DID EN MASSE.

QUITE A FEW PEOPLE WERE HERE AT THE TIME YOU TOOK THAT OATH.

IT'S SOMETHING THAT CAN ALMOST BE DONE RATHER CAVALIERLY UNDER THE CIRCUMSTANCES. BUT NOW THAT YOU'RE HERE, NOW THAT WE'VE ALL BEEN BROUGHT TOGETHER TO THIS STAGE OF THE CASE, THE OATH TAKES ON MORE MEANING.

THE OATH REALLY MEANS SOMETHING NOW, AND IT MEANS YOU ARE GOING TO FOLLOW THE LAW THAT JUDGE BEAM GIVES YOU.

THERE MAY BE SOME THINGS YOU DON'T LIKE THE LAW, BUT THE LAW IS NOT WHAT YOU LIKE ABOUT THE LAW, BUT THE LAW IS WHAT YOU ARE DUTYBOUND TO FOLLOW.

SO, AS YOU CONSIDER THE CASE, BARE [sic] IN MIND THE OATH AND BARE [sic] IN MIND THE LAW WILL GUIDE [860] YOU.

YOU WILL NOT BE LOST IN THIS DELIBERATION PROCESS.

THE LAW WILL GUIDE YOU ALONG WITH THE EVIDENCE THAT HAS BEEN PRESENTED TO A JUSTIFIED AND APPROPRIATE VERDICT.

JUST ANOTHER THING OR TWO.

ONE THING IS, IN ADDITION TO TAKING THE OATH, IS THE FACT WHAT YOU AS JURORS REPRESENT.

WHEN YOU RENDER YOUR VERDICTS IN THIS CASE, YOUR VERDICTS WILL BE A REFLECTION OF YOUR OWN INDIVIDUAL AS WELL AS COLLECTIVE CONSCIENCES.

BUT IN A CASE LIKE THIS, YOU REPRESENT THE CONSCIENCES OF THE COMMUNITY AS WELL.

THE COMMUNITY CONSISTS OF THE PEOPLE WHO LIVE IN THE AREA, THE PEOPLE WHO LIVE IN THE COUNTY.

IT CONSISTS OF THE SURVIVING VICTIMS FROM THE WANDER INN BAR ROBBERY AND SHOOTING.

AND WHEN YOU RENDER A VERDICT IN THIS CASE, IT'S A VERDICT THAT REFLECTS NOT ONLY WHAT YOU FEEL, BUT A REFLECTION OF THE OUT RAGE OF THE COMMUNITY AS TO THESE TYPES OF ACTIONS AS WELL.

SO THAT IS SOMETHING THAT SHOULD FACTOR IN AS WELL.

AND THEN LASTLY, I'M SIMPLY GOING TO ASK OF YOU TO HAVE THAT MORAL COURAGE TO DO WHAT IS RIGHT.

WE WILL ABIDE BY YOUR DECISION. YOU AGAIN AS THE CONSCIOUS OF THE COMMUNITY WILL MAKE THAT [861] DECISION AND WE WILL ABIDE BY IT, THE COURT, MYSELF, THE COMMUNITY.

BUT SIMPLY HAVE THE MORAL COURAGE TO TAKE A STAND AND TO DO WHAT IS RIGHT IN THIS CASE.

AND I SUBMIT TO YOU WHAT IS RIGHT IS THIS, THAT YOU SHOULD FIND THAT THE AGGRAVATING EVIDENCE THAT HAS BEEN PRESENTED TO YOU DOES IN FACT SUBSTANTIALLY OUTWEIGH THE MITIGATING EVIDENCE, THAT QUITE FRANKLY NOT MUCH CAN BE SAID THAT IS GOOD ABOUT THIS DEFENDANT, IF ANYTHING AT ALL, AND I SUBMIT TO YOU THAT THE EVIDENCE REALLY REVEALS NOTHING REDEEMING ABOUT HIM WHATSOEVER.

IN LIGHT OF THAT AND ACCORDINGLY, YOU SHOULD FIND THE RIGHT VERDICT TO BE THE VERDICT OF DEATH AS TO THIS DEFENDANT IN THIS CASE.

THANK YOU VERY MUCH.

THE COURT: MR. SLICK.

MR. SLICK: THANK YOU, YOUR HONOR.

DEFENSE PENALTY ARGUMENT (VOL 14, P. 861)

ARGUMENT

BY MR. SLICK:

YOUR HONOR, MR. HODGMAN, LADIES AND GENTLEMEN.

AS I STAND HERE NOW, YOU HAVE FOUND PAUL TUILAEPA GUILTY OF MURDER, AND YOU HAVE FOUND THE SPECIAL CIRCUMSTANCES TRUE.

AND IN PARTICULAR, YOU HAD TO, BUT IN PARTICULAR YOU FOUND IT TRUE THAT HE INTENDED TO KILL [862] THE PERSON THAT HE KILLED.

I TRUST IN YOUR DECISION, AND YOU WERE OUT LONG ENOUGH TO DO IT, TO GIVE ME AND TO TREAT ME FAIRLY, AND I TRUST YOU DID.

I TRUST THAT YOU GAVE ME THAT FAIR DECISION.

AND IT WAS A CARING – I HOPE FOR MYSELF AND FOR YOU, IT WAS A CARING – AND I THINK IT WAS – A CARING AND THOUGHTFUL DECISION.

YOU REJECTED WHAT I HAD TO SAY ABOUT THE INTENT TO KILL.

OBVIOUSLY YOU DID, OR WE WOULDN'T BE HERE.

IN PRESENTING ARGUMENTS LIKE I DID EARLIER AND LIKE MR. HODGMAN DID NOW AND WHAT I'M GOING TO SAY AS I GO ALONG, ARGUMENTS ARE REALLY IN THIS STAGE OF THE TRIAL – ARE REALLY NOTHING MORE THAN GIVING ADVICE, AND I'M GOING TO TAKE ADVANTAGE OF IT.

WE BOTH HAVE THE OPPORTUNITY TO GIVE YOU ADVICE, BUT AS SUCH, IT OUGHT TO BE CONSIDERED THAT.

AND YOU – IT'S YOUR DECISION. YOU ARE THE ONES THAT TAKE THAT ADVICE AND DO WITH IT WHAT YOU MAY, ACCEPT IT, REJECT IT.

I HOPE THAT YOU THINK ABOUT WHAT BOTH OF US HAVE TO SAY AND THINK OF IT AS JUST ADVICE AND THEN ACT ACCORDINGLY.

YOU'VE DONE IT. YOU'VE TREATED ME THAT WAY, AND THAT'S APPROPRIATE.

[863] I'M GOING TO TALK A LITTLE MORE ABOUT THAT INTENT TO KILL ELEMENT AS WE GET INTO THAT, BUT CONSIDER WHAT I'M SAYING AS ADVICE.

I'M GOING TO TALK ABOUT SOME THINGS THAT – AND MR. HODGMAN TALKED ABOUT SOME THINGS THAT MAYBE CREEP INTO YOUR MINDS LATER.

AND I'M GOING TO TALK ABOUT SOME THINGS THAT MIGHT CREEP IN YOUR MINDS IF YOU VOTE

FOR THE DEATH PENALTY, IF YOU COME BACK WITH A VERDICT OF DEATH.

NEXT WEEK OR TOMORROW OR A YEAR FROM NOW, YOU MAY HAVE CERTAIN THINGS ENTER IN YOUR MINDS, AND I THINK YOU OUGHT TO THINK ABOUT THOSE THINGS NOW.

THE REASON FOR THAT IS, IF YOU TAKE THE TIME TO PREPARE, PREPARE NOW FOR A WORRY OR A SECOND THOUGHT THAT YOU MAY HAVE LATER ON, I THINK WHAT THAT DOES IS IT MAKES YOU – IT FORCES YOU AND IT IS A TOOL FOR YOU TO HAVE A MORE CAREFUL AND THOUGHTFUL DECISION.

WHAT YOU HAVE TO DECIDE RIGHT NOW, OF COURSE, IS WHETHER MR. TUILAEPA SHOULD BE PUT TO DEATH FOR THIS CRIME.

ONE OF THE GREAT TENDENCIES, I THINK, IS THE TENDENCY TO HAVE BEEN THINKING ABOUT THAT ALL ALONG, AND MAYBE YOU'VE DECIDED ALREADY ALL ALONG.

WELL, IF YOU HAVE AND YOU HAVE BEEN – THINKING ABOUT IT IS A NATURAL TENDENCY, AND BRINGING YOURSELF TO A CONCLUSION IS A NATURAL TENDENCY.

[864] I'M GOING TO ASK YOU TO REJECT THAT, BECAUSE I DON'T THINK THAT IS BEING COMPLETELY FAIR, AND IN FACT – I MEAN MAKING YOUR DECISION BASED ON WHAT YOU'VE THOUGHT ABOUT SO FAR.

I ASK YOU TO THINK ABOUT IT AGAIN, THINK ABOUT IT ANEW AND THEN MAKE YOUR DECISION ACCORDINGLY.

IN ORDER TO RETURN A VERDICT OF DEATH, YOU – EACH OF YOU MUST BE PERSUADED THAT THE CIRCUMSTANCES IN AGGRAVATION SO OUTWEIGH THE CIRCUMSTANCES IN MITIGATION AS TO WARRANT THE DEATH PENALTY.

THAT'S THE LAW PRETTY MUCH VERBATIM WHAT HIS HONOR IS GOING TO TELL YOU.

THAT'S WHAT YOU'VE GOT TO DO.

NOW, THERE'S TWO KEY ELEMENTS TO THAT.

ONE IS THAT THE AGGRAVATING CIRCUMSTANCES MUST SO SUBSTANTIALLY OUTWEIGH THE MITIGATING CIRCUMSTANCES IN ORDER TO RENDER A VERDICT OF DEATH.

BUT THE OTHER ELEMENT AND EQUALLY IMPORTANT – AND I THINK MAYBE YOU'VE ALREADY THOUGHT ABOUT IT THIS WAY – IS THE WORDS, EACH ONE OF YOU.

IT'S A TYPE OF DECISION THAT EACH ONE OF YOU SHOULD CONSIDER, AND I HOPE YOU DO, THAT IT'S YOUR DECISION BY YOURSELF.

YOU SHOULD THINK THIS DECISION, WHATEVER IT IS GOING TO BE, AS YOUR PERSONAL DECISION BY YOURSELF WITHOUT HELP FROM ANYONE AND WITHOUT SUPPORT FROM ANYONE.

[865] I SAY THAT WITH THIS EXCEPTION OR TO THIS EXTENT.

YOU'RE GOING TO DELIBERATE.

YOU'RE GOING TO GET A CHANCE TO TELL YOUR VIEWS TO YOUR FELLOW JURORS.

YOUR FELLOW JURORS ARE GOING TO GET A CHANCE TO TELL THEIR VIEWS TO YOU.

YOU'VE ALREADY DONE IT. YOU'VE ALREADY EXPERIENCED THAT PROCESS AND YOU KNOW EACH OTHER PRETTY WELL IN THAT PROCESS.

BUT THAT'S NOT GOOD ENOUGH.

WHEN YOU MAKE THE DECISION, WHEN YOU ULTIMATELY SAY YES OR NO, WHEN YOU WRITE THAT DECISION DOWN – WELL, THE FOREMAN WRITES IT DOWN.

WHEN YOU ULTIMATELY GIVE THAT FINAL VOTE, THOUGH, IT'S YOUR DECISION AND IT'S YOURS ALONE AND NOBODY ELSE'S.

THAT'S THE LAW. THAT'S WHAT I'M ENTITLED TO AND THAT'S WHAT'S RIGHT.

I THINK – WELL, YOU CAN'T TAKE COMFORT IN THE FACT THAT IT'S ONE OF 12. IT'S NOT ONE OF 12. IT'S NOT A GROUP DECISION.

ULTIMATELY ASSIGNED AS A GROUP, BUT IT'S 12 INDIVIDUAL DECISIONS.

IF I MAY BE PERMITTED TO SHOW AN EXAMPLE.

IT IS AS IF IT WAS THE SAME GROUP OF 12 OR YOU DECIDING ON AN UNLAWFUL KILLING.

YOU'RE GOING TO DECIDE ON A LAWFUL [866] KILLING.

BUT IF YOU WERE DECIDING ON AN UNLAWFUL KILLING, YOU VOTED FOR DEATH, AND THE PENALTY WAS CARRIED OUT, THEN YOU HAD TO ANSWER FOR IT LATER – IN THIS CASE, OBVIOUSLY YOU DON'T HAVE TO ANSWER FOR IT LATER, BECAUSE YOU'RE THE LAW.

BUT IN THIS EXAMPLE YOU HAVE TO ANSWER FOR IT LATER.

EACH ONE OF YOU, BY YOURSELF, WOULD BE PERSONALLY RESPONSIBLE, IF YOU ADOPT THE LAWS OF AIDING AND ABETTING AND THE LIKE.

I THINK YOU SHOULD VIEW IT THAT WAY, BECAUSE IT IS IMPORTANT.

WHEN YOU HAVE TO THINK ABOUT THE DECISION LATER, SHOULD YOU THINK ABOUT IT LATER, YOU'RE GOING TO BE BY YOURSELF WHEN YOU THINK ABOUT IT, AND YOU'RE NOT GOING TO HAVE THE OTHER 12 TO TALK ABOUT IT WHEN DID I MAKE THE RIGHT DECISION.

WHEN YOU ULTIMATELY DECIDE, THINK ABOUT IT AS YOUR PERSONAL DECISION.

I WANT TO TALK ABOUT LIFE WITHOUT THE POSSIBILITY OF PAROLE.

I'M GOING TO CITE AN EXAMPLE, AND THEN GO ON AND GIVE A BRIEF HISTORY AS TO HOW WE AS A SOCIETY HAVE GOTTEN WHERE WE ARE NOW.

AND I SAY THIS, AND I START OFF, AND I SAY THIS WITH THE UTMOST RESPECT I HAVE WITH YOU FOLKS – OR FOR YOU FOLKS.

[867] JUST LISTEN TO ME FOR WHAT IT'S WORTH.

THE FIRST MURDER, FIRST RECORDED MURDER, FIRST MURDER ON THIS EARTH IS RECORDED IN THE BIBLE, AND IT'S RECORDED IN THE BOOK OF GENESIS, AND YOU'RE PROBABLY ALL FAMILIAR WITH IT, IT'S WHERE CANE KILLED HIS BROTHER ABEL. FLAT KILLED HIM OUT OF JEALOUSY AND NO OTHER REASON, FLAT COLD-BLOODED MURDER AT THE END.

HE GOT PUNISHED FOR THAT AND HE GOT IN EFFECT LIFE WITHOUT POSSIBILITY OF PAROLE.

HE WAS BANISHED, ORDERED NEVER TO RETURN. COULD HAVE GOTTEN THE DEATH PENALTY. THERE WOULD HAVE BEEN NO PROBLEM AT ALL FOR HIM TO GET THE DEATH PENALTY, BUT HE DIDN'T.

I CITE THIS JUST TO SHOW YOU MY FEELINGS AND HOPEFULLY YOUR FEELINGS THAT LIFE WITHOUT THE POSSIBILITY OF PAROLE IS A VALID PUNISHMENT.

IT'S NOT SOMETHING THAT YOU SHOULD THINK OF AS SOMEBODY'S GETTING A BREAK OR THEY'RE NOT GETTING A BREAK.

IT'S A VALID PROPER PUNISHMENT, AND IT'S PROPER UNDER THE LAW, AND WE'LL TALK A LITTLE MORE ABOUT THAT AS WE GO.

IN OUR HISTORY, THOUGH, AFTER THAT FIRST MURDER, SOMETIME THEREAFTER, HUMAN BEINGS TOOK OVER THE BUSINESS OF PUNISHMENT, AND

FOR A LONG TIME, ALMOST EVERYTHING WAS PUNISHABLE BY DEATH.

AT ONE POINT IN TIME, IT WAS CRUCIFICATIONS.

[868] IF WE BRING IT UP CLOSER TO OUR TIME, WHICH IS MORE SIGNIFICANT TO US AS A PEOPLE, ABOUT EIGHT HUNDRED YEARS AGO, IN ENGLAND, WHERE OUR SOCIETY WAS REALLY DEVELOPED FROM, THE ROOTS OF OUR SOCIETY STARTED IN ENGLAND WAY BACK THEN, THEY PUNISHED FOR DEATH FOR ALMOST EVERYTHING, BURGLARIES, ROBBERIES, RAPES, THOSE KINDS OF THINGS WERE PUNISHABLE BY DEATH.

MOVING ON UP A HUNDRED YEARS AGO IN THE WEST, STILL A LOT OF CRIMES WERE PUNISHABLE BY DEATH OTHER THAN MURDER.

ONE OF THE COMMON THREADS THAT GO THROUGH THAT AND PERHAPS ONE OF THE REASONS WHY SO MANY CRIMES ARE PUNISHABLE BY DEATH – THERE'S NO SUCH THING AS LIFE WITHOUT THE POSSIBILITY OF PAROLE. THAT DIDN'T EXIST.

AND THE REASON WHY IT DIDN'T EXIST IS NO PRISONS.

YOU THINK ABOUT IT, BACK IN THOSE DAYS, YOU COULDN'T GIVE SOMEBODY LIFE WITHOUT POSSIBILITY OF PAROLE, BECAUSE IT DIDN'T EXIST.

THEY WOULD BE OUT OR SOMETHING WOULD HAPPEN.

SO IT WAS IMPOSSIBLE.

GOING UP THROUGH OUR SOCIETY – WELL, TODAY THAT DOES EXIST. WE DO HAVE PRISONS AND WE DO HAVE LIFE WITHOUT POSSIBILITY OF PAROLE.

GOING UP THOUGH OUR SOCIETY, THERE WAS A POINT OF TIME WHERE HERE, IN CALIFORNIA, WE DIDN'T [869] HAVE THE DEATH PENALTY.

THE COURT THREW IT OUT, AND THERE WAS SOME PERIOD OF TIME WHERE WE JUST HAD LIFE SENTENCES.

DIDN'T EXIST.

THEN, PEOPLE GOT LIFE SENTENCES. THEY CAME UP FOR PAROLE. IF YOU GOT SENTENCED FOR LIFE DURING THAT PERIOD OF TIME OR ANY TIME BEFORE AND UP TO THAT PERIOD OF TIME, OR IF YOU WENT ON TRIAL FOR THE DEATH PENALTY AND THE JURY SAYS LIFE, WHAT YOU GOT WAS, IN EFFECT, SEVEN YEARS FOR LIFE, BECAUSE AT THAT TIME EVERYBODY CAME UP FOR PAROLE AFTER SEVEN YEARS.

SO, YOU GO ON A DEATH PENALTY TRIAL LIKE YOU FOLKS HAVE, YOU RULE ON LIFE INSTEAD OF DEATH, SEVEN YEARS LATER THE GUY IS KNOCKING ON THE PAROLE DOORS, I'D LIKE TO GET OUT NOW.

WELL, THEY DIDN'T GET OUT THAT FAST. I'M NOT SAYING THEY DID. IN FACT, SOME OF THEM WOULD NEVER EVER EVER GET OUT NO MATTER WHAT ANY WAY.

THE SOCIETY DOES CONTROL THAT, BUT THE FACT IS THAT REMAINS.

IT'S WORTH TALKING ABOUT, AND THE REASON AND THE ONLY REASON I BRING THIS UP IS JUST TO DEMONSTRATE THE BEST I CAN THAT LIFE WITHOUT POSSIBILITY OF PAROLE MEANS LIFE WITHOUT POSSIBILITY OF PAROLE.

YOU DON'T GET OUT. YOU SIT THERE AND YOU SIT THERE AND YOU SIT THERE.

THERE ARE CROOKS IN JAIL THAT PROBABLY [870] SHOULD SIT THERE AND PROBABLY WILL, BUT THEY DO COME UP FOR PAROLE FROM TIME TO TIME, EVERY YEAR, EVERY TWO YEARS, DEPENDING ON THE SITUATION. THIS MAN WON'T COME UP FOR PAROLE.

WHEN YOU'RE DECIDING LIFE OR DEATH, IT'S NOT JUST LIFE THAT HE'S GOING TO GET OUT. IT'S NOT THAT.

PLEASE THINK ABOUT IT AS LIFE WITHOUT THE POSSIBILITY OF PAROLE. THEY ARE YOUR OPTIONS.

AGAIN, YOU MUST BE PERSUADED THAT THE AGGRAVATING CIRCUMSTANCES ARE SO SUBSTANTIAL IN NATURE, ARE SO SUBSTANTIAL IN COMPARISON WITH THE MITIGATING CIRCUMSTANCES.

THERE ARE FIVE FACTORS, ONLY FIVE.

THE JUDGE IS GOING TELL YOU THE OF FIVE FACTORS THAT YOU HAVE TO CONSIDER. AND HE'S GOING TO TELL YOU, YOU ARE FREE TO ASSIGN WHATEVER MORAL OR SIMPATHETIC [sic] VALUE

YOU WANT TO EACH OF THESE FACTORS OR ALL OF THEM.

BELIEVE ME, YOU'VE GOT JUST AN ENORMOUS AMOUNT OF DISCRETION.

I'M GOING TO GIVE YOU THE FIVE FACTORS, BUT HE'S GOING TO TURN YOU LOOSE TO ASSIGN A VALUE THAT YOU DEEM APPROPRIATE ON ALL FIVE.

YOU CAN –

IT'S NOT – YOU DON'T WEIGH THEM TWO TO ONE – I MEAN TWO TO THREE, OR FOUR TO ONE, THAT KIND OF THING. THAT'S NOT THE WAY IT IS.

[871] ANY ONE OF THOSE FACTORS ALL BY THEMSELVES, IF YOU FIND IN MITIGATION – ANY ONE OF THEM IS ENOUGH FOR A LIFE SENTENCE, ANY ONE.

THE POINT IS, YOU JUST HAVE SUCH A WIDE DISCRETION. THE FIELD IS WIDE OPEN.

I WANT TO TALK ABOUT THE FIVE FACTORS, EACH ONE OF THEM.

THE FIRST ONE, AND OBVIOUSLY THE MOST GLARING AND THE ONE YOU CAN'T ESCAPE IS WHAT BRINGS US HERE IN THE FIRST PLACE, THE WANDER INN MURDER. THAT'S WHY YOU'RE HERE. YOU CAN'T – YOU JUST CAN'T ESCAPE THAT WHAT I WANT YOU – I HOPE YOU TO DO – ZERO IN ON – AGAIN I'M GOING TO TALK ABOUT THOSE SHORT SECONDS IN TIME FROM THE TIME OF THE KNOCK DOWN –

NOW, I'M NOT BLAMING THIS FELLOW WHO GOT SHOT. I'M NOT BLAMING HIM ONE BIT. IT'S NOT HIS FAULT. I DON'T MEAN THAT AT ALL.

IT'S NOT WHY – IT'S JUST NOT WHY I'M HERE. PERIOD. IT'S NOT A FAIR THING TO TALK ABOUT. IT'S NOT HIS FAULT.

BUT UP UNTIL THAT POINT, THERE WASN'T GOING TO BE A MURDER.

AND YOU'RE NOT JUDGING THE MAN WHO GOT KNOCKED DOWN TO THE GROUND SAYING IT'S HIS FAULT IF YOU COME BACK WITH A LIFE VERDICT, YOU'RE NOT SAYING THAT AT ALL.

BUT THAT'S WHAT STARTS IT, AND WHAT STARTS [872] IT, YOU HAVE TO INTO MR. TUILAEPA'S MIND.

YOU DON'T LOOK INTO HIS MIND WHAT STARTS IT, BUT THAT IS WHAT STARTS IT.

I KNOW HE CAME THERE WITH A GUN, AND I KNOW HE CAME THERE PREPARED. I MEAN IT'S OBVIOUS, HOPING MAYBE YOU DON'T HAVE TO USE IT, HOPING THAT THIS THING IS GOING TO GO OKAY, BUT IT DOESN'T.

YEAH, I KNOW HE COULD HAVE SHOT INTO THE CEILING OR THE FLOOR AND REALLY ALL OF THAT IS TRUE.

BUT YOU STILL HAVE TO THINK, WHEN YOU'RE DECIDING WHAT TO DO WITH HIM AND YOU'RE DECIDING HOW AGGRAVATING THIS PARTICULAR CIRCUMSTANCE IS, TO GIVE ANY MEANING TO

THAT SECTION AT ALL, YOU HAVE TO LOOK – AND I HOPE YOU DO – INTO HIS MIND, THE THOUGHT PROCESS, THE AMOUNT HE THOUGHT ABOUT IT.

AND YES, PERHAPS YOU SHOULD THINK ABOUT HIS PROCESS FROM THE MOMENT HE HAS KNOWLEDGE OF THE FIGHT TO THE END OF THE BAR UNTIL HE LEAVES.

HE FIRES ONE SHOT, AND YOU CAN'T FORGET ABOUT THE OTHER THREE. YOU SHOULD CONSIDER THE WHOLE THING.

WHAT I'M ASKING YOU TO DO IS REMEMBER THAT YOU'RE GOING TO BE CONSIDERATE IN DECIDING WHETHER HE LIVES OR DIES BASED ON THOSE HANDFULL [sic] OF SECONDS, BECAUSE THAT'S WHEN THE DEED OR THAT'S WHEN THE INTENT WAS FORMED TO DO WHAT WAS DONE.

THE LAW RECOGNIZES DIFFERENT DEGREES OF THOUGHT PROCESS, DIFFERENT DEGREES OF REFLECTION, A [873] SIMPLE INTENT TO KILL OR SOMETHING STRONGER THAN A SIMPLE INTENT TO KILL.

YOU JUST TRIED A MURDER CASE AND YOU DECIDED ON A MURDER CASE THAT ALL THAT WAS REQUIRED – AS A MATTER OF FACT, WE JUST TALKED ABOUT THE MURDER, YOU DON'T EVEN HAVE TO WORRY ABOUT INTENT TO KILL. AN INTENT TO KILL IS NOT EVEN REQUIRED.

ALL YOU TO HAVE DO IS FIND THAT A KILLING OCCURRED DURING A ROBBERY.

THE ROBBERY SUPPLIES, THE EVIL, THE EVIL INTENT WHICH RAISES THIS THING TO A FIRST DEGREE MURDER. THAT'S HOW YOU GET – BUT THE LAW DOES RECOGNIZE IN OTHER TYPE OF KILLINGS, THAT INTENT TO KILL IS NOT FIRST DEGREE MURDER.

JUST BECAUSE – I HATE TO SAY JUST BECAUSE, BECAUSE THAT'S A SERIOUS THING, AND I DON'T MEAN TO LIGHTEN AT ALL.

BUT IF YOU HAVE AN INTENT TO KILL AND THERE IS IS [sic] A KILLING, THAT DOESN'T MEAN THERE'S A FIRST DEGREE MURDER.

THERE'S ANOTHER ELEMENT, AND THE LAW RECOGNIZES A MORE CAREFUL THOUGHT PROCESS, AND THAT THOUGHT PROCESS TO DELIBERATE AND PREMEDITATE.

A KILLING IS JUST AN INTENT TO KILL WITHOUT A ROBBERY OR WITHOUT CERTAIN SPECIAL THINGS WE DON'T HAVE TO TALK ABOUT NOW TO MAKE MY POINT.

KILLING WITH THE INTENT TO KILL, AND IT IS NOT FIRST DEGREE MURDER, PREMEDITATED IS A WAY TO GET [874] THE FIRST DEGREE MURDER.

AND I JUST WANT TO SHOW YOU HOW THE LAW DOES RECOGNIZE DIFFERENT THOUGHT PROCESSES AND DIFFERENT DEGREES OF REFLECTION ON SOMEBODY WHO COMMITS A MURDER.

TO CONSTITUTE A DELIBERATE AND PREMEDITATED KILLING, THE JUROR MUST WEIGH AND CONSIDER THE QUESTION OF KILLING AND THE

REASONS FOR AND AGAINST SUCH A CHOICE HAVING IN MIND THE CONSEQUENCES, HE DOES DECIDE TO AND DOES KILL.

SEE THE DIFFERENCE?

NOW, FORGET THE ROBBERY AGAIN, BUT IF SOMEONE INTENDS TO KILL SOMEBODY, IT'S NOT PUNISHABLE BY DEATH, IT'S NOT FIRST DEGREE MURDER.

IT'S ONLY FIRST DEGREE MURDER WHEN THERE'S A FURTHER THOUGHT PROCESS.

AS A MATTER OF FACT, AT ONE TIME, THE LAW DID REQUIRE THIS PROCESS IN ORDER TO HAVE A DEATH PENALTY IN THE FIRST PLACE.

IN ORDER TO HAVE SOMEONE EVEN CONSIDER – A JURY TO CONSIDER THE DEATH PENALTY, THIS THOUGHT PROCESS WAS REQUIRED.

IT'S NOT REQUIRED NOW, BUT I'M ASKING YOU TO THINK ABOUT IT, BECAUSE THAT'S THE ONLY THING THAT ADDS MEANING TO THE CIRCUMSTANCES OF THE CRIME.

OTHERWISE, WHAT'S THERE TO TALK ABOUT?

YOU HAVE TO TALK ABOUT THE CIRCUMSTANCES, THE DETAILS OF THE CRIME, AND IT'S NOT A DELIBERATE [875] AND PREMEDITATED KILLING.

IT'S OBVIOUS THAT THERE WAS NO WEIGHING AND CONSIDERATION OF THE CIRCUMSTANCES AND THE CONSEQUENCES OF THE ACT.

THAT'S A LEGITIMATE THING TO CONSIDER AND YOU SHOULD CONSIDER IT.

IN FACT, I THINK THAT'S REALLY FOR THOUGHT, HIGHLY IMPORTANT.

A SHORT PERIOD OF TIME. THERE'S THAT SHORT THOUGHT PROCESS, AND I'M OBVIOUSLY POSITIONED – I'M SUGGESTING TO YOU THAT THAT SHORT THOUGHT PROCESS DOES NOT RAISE ITSELF TO THE PREMEDITATED AND DELIBERATED THOUGHTFUL WEIGHING OF THE CONSEQUENCES KILLING, AND I SUGGEST TO YOU THAT THAT IS ENOUGH ALL BY ITSELF TO FIND THAT LESS THAN AN AGGRAVATING CIRCUMSTANCE, AND THAT'S ENOUGH FOR YOU TO DECIDE WITHOUT ANYTHING ELSE THAT THIS SHOULD BE A LIFE SENTENCE WITHOUT THE POSSIBILITY OF PAROLE.

YES, IT COULD HAVE BEEN FOUR INSTEAD OF ONE, BUT FOR THE GRACE OF GOD IT COULD HAVE BEEN FOUR, BUT FOR THE GRACE OF GOD IT COULD HAVE BEEN NONE.

YOU CAN'T THINK OF WHAT YOU'RE NOT GOING TO PUNISH FOR WHAT COULD HAVE BEEN, YOU'RE GOING TO PUNISH FOR WHAT WAS AND WHAT IS AND THE THOUGHT PROCESS OF MR. TUILAEPA.

THE NEXT FACTOR, I'LL JUST GO RIGHT DOWN THE SAME ORDER THAT THE COURT'S GOING TO GIVE IT TO YOU.

[876] THE NEXT FACTOR IS PAST ACTS OF VIOLENCE, CRIMINAL ACTS OF VIOLENCE.

WELL, I HEARD THEM, TOO, AND BOY, IT SEEMS TO ME THAT, LOOK AT THIS WHOLE PICTURE, THAT'S PRETTY INSIGNIFICANT.

I WOULDN'T WANT TO BE ROBBED, AND I WOULDN'T WANT TO HAVE SOMEBODY SAY BAD WORDS TO ME OR THREATEN ME IN ANY WAY.

WHEN THE THREATS WERE MADE –

ONE OF THE THINGS THAT I SUPPOSE IS A LITTLE DISTURBING, AND THAT IS, MAYBE THE DEGRADING COMMENTS TO THE WOMEN, AND I THINK IT'S A FAIR THING TO WEIGH THE DEGRADING COMMENTS TO WOMEN AS FAR AS THE DEGRADATION OF THE WOMEN WATCHING THE MEN TAKE SHOWERS.

IT'S THE SAME WOMEN, SAME PEOPLE.

I'M NOT SAYING IT'S THEIR FAULT WHEN THEY GET A BAD COMMENT AND IT'S NOT THEIR FAULT AT ALL BECAUSE THE SYSTEM DICTATES THIS.

BUT BY GOLLY, IT, IN A WAY, INVITES BAD COMMENTS, IT REALLY DOES, WHEN YOU HAVE WOMEN SUPERVISEING [sic]—YEAH, THEY'VE GOT TO MAINTAIN EYE CONTACT THAT KIND OF THING I THINK IS TERRIBLE.

AND IT DOES INVITE LOW-GRADE, DISTASTEFUL COMMENTS.

BUT THAT ASIDE, LOOKING AT THE WHOLE THING, I DON'T THINK YOU WILL FEEL RIGHT ABOUT YOURSELVES IF YOU DECIDE THIS CASE BASED ON THAT KIND [877] OF CONDUCT.

I SUGGEST TO YOU THAT THAT'S NOT SIGNIFICANT ENOUGH, WHEN YOU START TALKING ABOUT SUBSTANTIAL COMPARISON – THAT'S NOT SIGNIFICANT ENOUGH TO THINK ABOUT TO TAKE AWAY FROM WHAT WE TALKED ABOUT EARLIER.

THIRD ITEM, PRIOR FELONY CONVICTIONS. THERE ARE NONE.

THAT'S A CIRCUMSTANCE THAT YOU CAN CONSIDER AND YOU CAN CONSIDER THAT ALONG WITH HIS AGE, 21 YEARS OLD, MAYBE TOO YOUNG TO HAVE A STRING OF FELONIES, MAYBE.

BUT HE DOESN'T HAVE ANY FELONIES, AND YOU SHOULD CONSIDER THAT THE ONLY THING HE'S GOT THAT YOU CAN CONSIDER IS WHAT YOU'VE BEEN TOLD ABOUT, AGE.

YEAH, HE'S OLD ENOUGH, 16-YEAR OLD IS OLD ENOUGH.

BY THE WAY, WHEN WE TALK ABOUT AGE AND YOU TALK ABOUT AGE IN COMPARISON OF SOME OF THESE THREATS, SOME OF THE THREATS TO THE WOMEN, BACK UP HE'S 15, 15, 17 YEARS OLD, HE'S REALLY A YOUNGSTER MAKING THESE KIND OF THREATS, THESE KIND OF BAD COMMENTS.

BUT ANYWAY, AGE.

YEAH, HE'S OLD ENOUGH TO MAKE A DECISION.

OBVIOUSLY ARE YOU OLD ENOUGH AT 14, 15, 16, 30?

THAT'S NOT THE LAW.

THE LAW IS AGE, PERIOD, NOT WHETHER YOU'RE [878] OLD ENOUGH, BUT AGE.

HE'S A YOUNG MAN AND YOU SHOULD CONSIDER THAT.

YEAH, HE'S MATURE ENOUGH TO MAKE A DECISION.

DOESN'T HAVE A VERY HIGH IQ, CAN'T THINK THINGS THROUGH VERY WELL OR DOESN'T, BUT, YEAH, HIS AGE IS A MITIGATING FACTOR, AND THAT'S ENOUGH OF A MITIGATING FACTOR TO CONSIDER.

FINALLY, THE FIFTH ITEM – YOU KNOW, YOU TALK ABOUT FIVE SEPARATE ITEMS, AND THEN YOU GET TO ITEM NUMBER FIVE, AND ITEM NUMBER FIVE IN EFFECT SAYS EVERYTHING. IT REALLY DOES. IT'S ALL OF THE ABOVE. IT'S EVERYTHING. IT'S WHATEVER SIMPATHETIC [sic] OR MORAL VALUE YOU WANT TO PLACE ON IT.

ANY SYMPATHY YOU WANT TO GIVE MR. TUILAEPA OR HIS FAMILY.

YOU HEARD ABOUT HIS IQ, YOU HEARD ABOUT HIS PROBLEMS.

DO WITH IT WHAT YOU MAY.

I THINK THAT'S ENOUGH, BUT IT'S EASIER FOR ME. I'M THE ONE JUST GIVING THE ADVICE.

I SPEND A LOT OF TIME, AS MR. HODGMAN DOES AND AS HE DID – I TOO HAVE A LOT OF CONCERN ON THESE KINDS OF CASES.

I SWEAT BULLETS.

I SWEAT ABOUT SELECTING A JURY IN THE FIRST PLACE.

[879] AND I SWEAT ABOUT HOW THE EVIDENCE IS GOING TO COME IN.

I'M SWEATING NOW WHAT IN THE WORLD AM I GOING TO SAY AND THAT KIND OF THING.

I WORRY MORE IN THESE KIND OF CASES THAN ANY OTHER KIND. THEY'RE THAT SERIOUS.

WHEN I COME DOWN TO IT, I DON'T HAVE TO MAKE THE DECISION.

YOU FOLKS ARE THE ONE AND YOU REALLY CARRY THE BURDEN TO THE N-TH DEGREE MORE THAN WHAT I CARRY IT.

IT REALLY IS. IT'S AN ENORMOUS RESPONSIBILITY.

I'M DOWN TO A HANDFULL OF CLOSING COMMENTS.

SPEAKING ABOUT AGAIN THE DEATH PENALTY VERSUS LIFE WITHOUT THE POSSIBILITY OF PAROLE.

A COUPLE OF THINGS I'D LIKE YOU TO THINK ABOUT.

I DON'T KNOW THAT THESE ARE GOING TO BE PERSUASIVE, BUT PUT THEM IN YOUR MIND AND

USE THEM AS YOU THINK ABOUT THIS CASE AND AS YOU DISCUSS IT.

ULTIMATELY, YOU'VE GOT TO DECIDE LIFE OR DEATH, AND A PRETTY BIG DECISION.

I THINK YOU SHOULD CONSIDER IT AS ONE OF THE MOST IMPORTANT DECISIONS THAT YOU'LL EVER HAVE TO MAKE, AND I THINK YOU WILL FEEL BETTER ABOUT YOURSELF IF YOU DO THAT.

[880] IN LOOKING AT, THOUGH, LIFE OR DEATH, ONE OF THE THINGS WORTH THINKING ABOUT AND TALKING ABOUT I THINK IS THAT HE'S GOING TO GET PUNISHED AND ARE YOU FORGIVING HIM BY GIVING HIM A LIFE SENTENCE.

AND I SUGGEST THAT YOU'RE NOT FORGIVING HIM.

YOU DON'T HAVE TO FORGIVE HIM. YOU DON'T HAVE TO DO THAT TO REACH THAT DECISION.

IN SOME CIRCLES MAYBE THAT'S A GREATER PUNISHMENT.

IF YOU THINK ABOUT IT, DEATH SENTENCE – AND TAKES AWHILE TO CARRY OUT DEATH SENTENCES THESE DAYS. START IT OFF ABOUT TEN YEARS, AND NOW THE TIME IS GETTING SHORTER AND SHORTER AND SHORTER.

PUNISHMENT STOPS ON DEATH. THAT'S THE END OF THE PUNISHMENT.

LIFE WITHOUT PAROLE – THAT'S A SERIOUS THING. MR. HOGMAN [sic] IS RIGHT. IT'S SERIOUS

THING, IT JUST GOES ON AND ON AND ON AND THE PUNISHMENT NEVER EVER STOPS.

WHATEVER HAPPENS, HEREAFTER, AFTER SOMEONE IS GONE IS NOT UP TO US AND THAT DOESN'T MATTER.

THAT PUNISHMENT THAT HE MAY RECEIVE DOESN'T DEPEND WHETHER HE GETS THE LIFE OR THE DEATH PENALTY, HAS NO RELEVANCE TO THAT WHATEVER.

I THINK ONE OF THE –

IF YOU COULD GET THIS RESULT EVERY TIME, IT MIGHT ONE [sic] OF THE HARSHEST PUNISHMENTS YOU COULD PUT [881] ON SOMEBODY AND THAT IS TO HAVE THEM SOME DAY, 30, OR 40 YEARS, WHATEVER IT TAKES, FOR SOMEONE TO COMMENT ON THE ENORMITY OF HIS CRIME, WHEN HE COMMITS THIS KIND OF CRIME, TO SIT DOWN AND REALLY REALIZE WHAT HE'S DONE.

GREATER PUNISHMENT. I THINK.

NOW YOU CAN'T GUARANTEE THAT THAT HAPPENS, BUT SOMETIMES, SOMETIME MAYBE IT WILL HAPPEN, GREATER PUNISHMENT THAN DEATH.

DON'T FORGIVE HIM. I DON'T MEAN, AND I DON'T EXPECT THAT. I DON'T EXPECT YOU HAVE TO DO THAT TO FIND DEATH.

WE HAVEN'T HAD A DEATH SENTENCE CARRIED OUT IN THIS STATE, IN A LONG LONG TIME, 20 YEARS.

IN THE COUNTRY, THINGS ARE PICKING UP.

WE'RE HAVING MORE AND MORE EXECUTIONS.

I SAY THIS JUST HOPEFULLY TO IMPRESS UPON YOU THAT IT IS REAL.

WE'VE HAD I THINK 86 IS THE COUNT SO FAR AND SOMEBODY KEEPS DAILY TABS ON THAT AND PUBLISHES IT IN THE PAPER.

THE PREDICTION HERE IN THIS STATE IS TO START THE EXECUTIONS BACK UP IN SEPTEMBER – I MEAN, I'M SORRY, AFTER THE FIRST OF THE YEAR.

BUT WE'RE GOING TO HAVE THEM.

AND WHEN YOU MAKE THAT DECISION, I THINK YOU SHOULD HAVE IN YOUR MIND THAT IT'S NOT LIKE IT USED TO BE. IT'S A REAL DECISION.

[882] WHEN YOU DECIDE DEATH, IT'S GOING TO BE DEATH.

IF YOU DECIDE LIFE WITHOUT POSSIBILITY OF PAROLE, IT'S GOING TO BE LIFE WITHOUT POSSIBILITY OF PAROLE.

THIS ISSUE OF THE DEATH PENALTY, THOUGH, IS A HIGHLY CHARGED TYPE THING.

A LOT OF POLITICIANS HAVE WON AND LOST CAREERS OVER THIS ONE ISSUE.

TEN YEARS AGO WHEN IT WAS ON THE BALLOT, I THINK IT WAS ON THE BALLOT AS PROPOSITION SEVEN. HIGHLY CHARGED ISSUES. YOU MAY HAVE VOTED FOR IT OR AGAINST IT. I HAVE NO WAY OF

KNOWING, BUT YOU MAY HAVE VOTED FOR IT. SOME OF YOU MAY HAVE BEEN TOO YOUNG TO VOTE FOR IT, BUT YOU MAY HAVE.

THIS LAST ELECTION THREE JUDGES LOST THEIR JOBS OVER THE DEATH PENALTY.

I'M NOT SAYING THAT THEY DID SOMETHING WRONG OR DIDN'T DO SOMETHING WRONG, BUT IT WAS PERCEIVED BY THE PUBLIC THAT THEY DID SOMETHING WRONG BY NOT ENFORCEING [sic] THE DEATH PENALTY, AND THEY LOST THEIR JOBS.

YOU MAY HAVE VOTED AGAINST THEM, YOU MAY HAVE VOTED FOR THEM.

I DON'T THINK THAT MATTERS.

I'M HOPING THAT THE ORIGINAL SCREENING PROCESS THAT WE WENT THROUGH – WE KICKED OUT BOTH ENDS OF THE EXTREMISTS, THE PEOPLE THAT WANT TO VOTE [883] FOR THE DEATH PENALTY ALL THE TIME AND THE PEOPLE WHO WOULDN'T ALL THE TIME, THAT KIND OF THING.

HOW YOU VOTED IS OF NO RELEVANCE AT ALL.

BUT I THINK WHAT YOU SHOULD HAVE IN YOUR MIND, IS THAT WHATEVER VOTE YOU MAKE, WHATEVER PERSONAL VOTE YOU MAKE, THAT'S GOING TO BE CARRIED OUT.

SOMETIME AFTERWARD, YEARS DOWN THE ROAD, YOU'RE GOING TO HEAR MAYBE TUILAEPA ON THE RADIO.

MAYBE IN FIVE YEARS, THERE WILL BE ENOUGH EXECUTIONS YOU WON'T HEAR THEM SO MUCH IN

CALIFORNIA, BUT YOU'LL SOMETIME BEFORE THAT MAY HEAR A SAMOAN SOUNDING NAME. MAYBE YOU'LL FORGET HIS NAME, BUT HE'S GOING TO DIE TOMORROW MORNING OR WHATEVER THE SITUATION IS, AND I'LL GUARANTEE THAT WHEN YOU HEAR THE NAME, YOU HEAR A SAMOAN SOUNDING NAME, YOU'LL THINK BACK ABOUT THIS CASE, YOU WILL HAVE I DON'T KNOW WHAT YOU'RE GOING TO BE DOING, DRIVING A CAR OR HEARING THE RADIO OR AT HOME, BUT YOU WILL THINK ABOUT THIS CASE.

I THINK NOW IS THE TIME TO PREPARE FOR HOW YOU FEEL LATER.

YOU KNOW, THE LITTLE INSTRUCTION OF BEYOND A REASONABLE DOUBT, THE LAST THING IS OR THE PERMANENT, THE ABIDING CONVICTION.

WELL, THIS IS A PERMANENT THING, AND THIS IS THE KIND OF THING THAT WILL PROBABLY STICK WITH YOU A LITTLE BIT LONGER, YOUR EXPERIENCE IN THIS CASE.

[884] I THINK WHAT YOU HAVE TO DO NOW IS TO GET READY TO HEAR THE EXECUTION BEING CARRIED OUT.

THINK OF IT IN THOSE TERMS.

THINK OF IT AS A REAL LIVE, HONEST TO GOODNESS THING, WHATEVER YOU VOTE WILL HAPPEN, AND THEN I ASK YOU TO VOTE, VOTE THAT HE GET LIFE, AND I'M NOT ASKING FOR

FORGIVE [sic] NECESSARY, I'M ASKING THAT YOU VOTE FOR A LIFE SENTENCE.

THANK YOU.

PENALTY PHASE JURY INSTRUCTIONS Vol. 4 p. 884

THE COURT: (READING)

THE DEFENDANT IN THIS CASE, LADIES AND GENTLEMEN, HAS BEEN FOUND GUILTY OF MURDER OF THE FIRST DEGREE.

THE CHARGE THAT THE MURDER WAS COMMITTED UNDER A SPECIAL CIRCUMSTANCE HAS BEEN SPECIALLY FOUND TO BE TRUE.

IT IS THE LAW OF THIS STATE THAT THE PENALTY FOR A DEFENDANT FOUND GUILTY OF MURDER IN THE FIRST DEGREE SHALL BE DEATH OR CONFINEMENT IN THE STATE PRISON FOR LIFE WITHOUT POSSIBILITY OF PAROLE.

IN ANY CASE IN WHICH THE SPECIAL CIRCUMSTANCE CHARGED IN THIS CASE HAS BEEN SPECIALLY FOUND TO BE TRUE.

UNDER THE LAW OF THIS STATE, YOU MUST NOW DETERMINE WHICH OF SAID PENALTIES SHALL BE IMPOSED ON THE DEFENDANT.

[885] IN DETERMINING WHICH PENALTY IS TO BE IMPOSED ON THE DEFENDANT, YOU SHALL CONSIDER ALL OF THE EVIDENCE THAT HAS BEEN RECEIVED DURING ANY PART OF THE TRIAL IN THIS CASE.

YOU SHALL CONSIDER, TAKE INTO ACCOUNT AND BE GUIDED BY THE FOLLOWING FACTORS, IF APPLICABLE:

A, THE CIRCUMSTANCES OF THE CRIME IN WHICH THE DEFENDANT WAS CONVICTED IN THE

PRESENT PROCEEDING AND THE EXISTENCE OF ANY SPECIAL CIRCUMSTANCE FOUND TO BE TRUE.

B, THE PRESENCE OR ABSENCE OF CRIMINAL ACTIVITY BY THE DEFENDANT WHICH INVOLVED THE USE OR ATTEMPTED USE OF FORCE OR VIOLENCE OR THE EXPRESS OR IMPLIED THREAT TO USE FORCE OR VIOLENCE.

C, THE PRESENCE OR ABSENCE OF ANY PRIOR FELONY CONVICTION.

D, THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME.

E, ANY OTHER CIRCUMSTANCE WHICH EXTENUATES THE GRAVITY IT [sic] OF THE CRIME EVEN THOUGH IT IS NOT A LEGAL EXCUSE FOR THE CRIME.

AND ANY SIMPATHETIC [sic] OR OTHER ASPECT OF THE DEFENDANT'S CHARACTER OR RECORD THAT THE DEFENDANT OFFERS AS A BASIS FOR A SENTENCE LESS THAN DEATH WHETHER OR NOT RELATED TO THE OFFENSE FOR WHICH HE IS ON TRIAL.

YOU MUST DISREGARD ANY JURY INSTRUCTION GIVEN TO YOU IN THE GUILT OR INNOCENCE PHASE OF THIS [886] TRIAL WHICH CONFLICTS WITH THIS PRINCIPLE.

EVIDENCE HAS BEEN INTRODUCED FOR FOR [sic] THE PURPOSE OF SHOWING THAT THE DEFENDANT TUILAEPA HAS COMMITTED CRIMINAL ACTS WHICH INVOLVE THE EXPRESS OR IMPLIED USE OF

FORCE OR VIOLENCE OR THE THREAT OF FORCE OR VIOLENCE.

BEFORE YOU MAY CONSIDER ANY SUCH CRIMINAL ACTS AS AN AGGRAVATING CIRCUMSTANCE IN THIS CASE, YOU MUST FIRST BE SATISFIED BEYOND A REASONABLE DOUBT THAT THE DEFENDANT DID IN FACT COMMIT SUCH CRIMINAL ACTS.

YOU MAY NOT CONSIDER ANY EVIDENCE OF ANY OTHER CRIMINAL ACTS AS AN AGGRAVATING CIRCUMSTANCE.

IT IS NOW YOUR DUTY TO DETERMINE WHETHER OF THE TWO PENALTIES, DEATH OR CONFINEMENT IN THE STATE PRISON FOR LIFE WITHOUT POSSIBILITY OF PAROLE, SHALL BE IMPOSED ON THE DEFENDANT.

AFTER HAVING HEARD ALL THE EVIDENCE AND HAVING HEARD AND CONSIDERED THE ARGUMENTS OF COUNSEL, YOU SHALL CONSIDER, TAKE INTO ACCOUNT AND BE GUIDED BY THE APPLICABLE FACTORS OF AGGRAVATING AND MITIGATING CIRCUMSTANCES UPON WHICH YOU HAVE BEEN INSTRUCTED.

IN WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES DOES NOT MEAN A MERE MECHANICAL COUNTING OF FACTORS ON EACH SIDE OF AN IMAGINARY SCALE OR THE ARBITRARY ASSIGNMENT OF WEIGHTS TO ANY OF THEM.

YOU ARE FREE TO ASSIGN WHATEVER MORAL OR [887] SIMPATHETIC [sic] VALUE YOU DEEM

APPROPRIATE TO EACH AND ALL OF THE VARIOUS FACTORS YOU ARE PERMITTED TO CONSIDER.

IN WEIGHING THE VARIOUS CIRCUMSTANCES, YOU SIMPLY DETERMINE UNDER THE RELEVANT EVIDENCE WHICH PENALTY IS JUSTIFIED AND APPROPRIATE BY CONSIDERING THE TOTALITY OF THE AGGRAVATING CIRCUMSTANCES WITH THE TOTALITY OF THE MITIGATING CIRCUMSTANCES.

TO RETURN A JUDGMENT OF DEATH, EACH OF YOU MUST BE PERSUADED THAT THE AGGRAVATING EVIDENCE IS SO SUBSTANTIAL IN COMPARISON WITH THE MITIGATING CIRCUMSTANCES THAT IT WARRANTS DEATH INSTEAD OF LIFE WITHOUT PAROLE.

YOU SHALL NOW RETIRE AND SELECT ONE OF YOUR NUMBER TO ACT AS FOREMAN WHO WILL PRESIDE OVER YOUR DELIBERATIONS.

IN ORDER TO MAKE A DETERMINATION AS TO THE PENALTY, ALL 12 JURORS MUST AGREE.

ANY VERDICT THAT YOU REACH MUST BE DATED AND SIGNED BY YOUR FOREMAN ON A FORM THAT WILL BE PROVIDED, AND THEN YOU SHALL RETURN WITH IT TO THIS COURTROOM.

THE CLERK WILL SWEAR THE BAILIFF.

THE CLERK: YOU DO SOLEMNLY SWEAR THAT YOU WILL TAKE CHARGE OF THE JURY AND KEEP THEM TOGETHER, THAT YOU WILL NOT SPEAK TO THEM YOURSELF NOR ALLOW ANYONE ELSE TO SPEAK TO THEM UNLESS UPON ORDER OF THE

COURT, AND WHEN THEY HAVE AGREED UPON A VERDICT, YOU'LL RETURN

* * *

8-13-87

We the jury of 12 have *not* come to a unanimous 12-0 verdict.

After 8 ½ hours of deliberation we feel that further deliberations will not make any difference.

Foreman
Jerry Shely

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

The People of the State of California	)	CASE NUMBER A035060
PLAINTIFF(S)	)	DEPARTMENT NUMBER SO G
vs.	)	
TUILAEPA, PAUL PALALAUA	)	VERDICT
DEFENDANT(S)	)	

We, the Jury in the above-entitled action, FIND that the aggravating circumstances substantially outweigh the mitigating circumstances and that the defendant PAUL PALALAUA TUILAEPA should have imposed the sentence of death on him.

FILED
Illegible

This 14th day of AUG. 1987. /s/ Jerry Shely
Foreman

76v210(Rev. 11-81)2-85

VERDICT

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

The People of the State of California	)	CASE NUMBER A035060
PLAINTIFF(S)	)	DEPARTMENT NUMBER SO G
vs.	)	
TUILAEPA, PAUL PALALAUA	)	VERDICT
DEFENDANT(S)	)	

We, the Jury in the above-entitled action, FIND that the aggravating circumstances do not substantially outweigh the mitigating circumstances and that the defendant PAUL PALALAUA TUILAEPA should have imposed on him confinement in the State Prison for LIFE WITHOUT THE POSSIBILITY OF PAROLE.

Illegible

This ___ day of ___ 19__. _____
Foreman

76V225(Rev. 1-81)11-83
C128

VERDICT

Supreme Court of California

[No. S004786. Crim. No. 26420. Dec. 28, 1992.]

THE PEOPLE, Plaintiff and Respondent, v.
PAUL PALALAUA TUILAEPA, Defendant and Appellant.

OPINION

BAXTER, J. – A jury convicted defendant Paul Palalaua Tuilaepa of the first degree murder and attempted robbery of Melvin Whiddon. (Pen. Code, §§ 187, subd. (a), 211/664.)[1] Defendant was also convicted of six counts of robbery (Lee Malstrom, Russell Knapp, Gary Grose, Larry Swanson, Debra Tomassini, and Bruce Monroe) and of two counts of assault with a firearm (Kelvin Whiddon and Kenneth Boone). (§§ 211, 245, subd. (a)(2).) An allegation that defendant personally used a rifle in the commission or attempted commission of each of the foregoing offenses was found true. (§§ 12022.5, 1203.06, subd. (a)(1).) An allegation that defendant inflicted great bodily injury in committing one of the robberies (Bruce Monroe) and both of the assaults (Kelvin Whiddon and Kenneth Boone) was also found true. (§ 12022.7.) Finally, the jury found true a special circumstance that the murder of Melvin Whiddon occurred during the commission of a robbery. (§ 190.2, subd. (a)(17)(i).)

Following a penalty trial, the jury sentenced defendant to death and the trial court denied the automatic

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

motion to modify the verdict. (§ 190.4, subd. (e).) This appeal is automatic. (§ 1239. subd. (b).)

We find no prejudicial error at the guilt or penalty phases of defendant's trial. The judge will be affirmed in its entirely.

I. Guilt Phase Evidence

The crimes occurred at 5:30 p.m. on October 6, 1986, at the Wander Inn Bar in Long Beach. Eight surviving victims were called as witnesses for the prosecution at trial. Viewed as a whole, their eyewitness testimony established the following sequence of events:

A small crowd had gathered to watch Monday night football on television. The front and rear doors were open, and daylight streamed in. The interior lights were on, including those located directly above the bar.

Defendant and another man entered the establishment.[2] Defendant wore a dark jacket and the other man wore a long dark coat. Both men also apparently wore hairnets and "khaki" clothes of some sort. All eight eyewitnesses noticed that defendant was carrying a rifle, and many of them recognized it as a .22-caliber weapon. No one actually saw a weapon in the hands of the other man but – based on the testimony of one witness described below – it appears he was carrying a firearm under his coat.

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[2] Defendant was tried alone. His partner was not identified in these proceedings.

Defendant and his partner approached the bartender, who was standing at the cash register behind the bar with his back to the room. The bartender heard some shouting and turned around. Defendant pointed the rifle in his face and demanded money – "everything" in the register. The bartender, Malstrom, pulled the tray out of the register and set it and the cash on the bar. Defendant and his partner stuffed the money into their pockets.

The pair then split up and began robbing patrons at the bar. Defendant, who was still holding the rifle, moved down the bar to Malstrom's left and confronted three victims. Specifically, defendant took money belonging to Knapp that was lying on the bar in front of him. Defendant then pushed Grose and grabbed his money from the bar and took his wallet. Defendant also pushed Swanson and took his wallet.

Meanwhile, defendant's accomplice took money and a wallet from two victims on the opposite side of the bar – Tomassini and Monroe. When the accomplice reached the end of the bar on his side of the room (i.e., to the bartender's right), he encountered twin brothers Melvin and Kelvin Whiddon. The accomplice pushed Melvin from behind, demanded money, and reached for his wallet. Melvin spun around on his stool and started fighting with the robber. At some point, Melvin knocked the accomplice to the ground.

There was no dispute among witnesses that defendant walked towards the scuffle and, holding the rifle at hip or waist level, shot Melvin in the neck.

Defendant then swung the rifle in Kelvin's direction. Kelvin dropped to the floor and tried to hide behind a post, but was shot by defendant in the chest.

Defendant then turned the rifle in the direction of Monroe's wife. Monroe jumped in front of her and was shot by defendant in the abdomen.

Another patron, Boone, testified that after defendant started shooting, the accomplice stood up and "a couple flashes" – presumably gunshots – came from underneath the accomplice's coat. Both robbers then ran past Boone towards the rear door. Before exiting the bar, defendant aimed the gun at Boone, smiled, and shot him in the neck.

The first shooting victim, Melvin, died at the scene. The autopsy physician described the nature of Melvin's injuries at trial. The other three gunshot victims – Kelvin, Monroe, and Boone – testified about the serious and, in some cases, permanent physical injury they sustained.

All eight eyewitnesses positively identified defendant at the trial and at the preliminary hearing. Each testified that they clearly saw defendant's face from a few inches to a few feet away. Almost everyone had consumed only part of a beer or other alcoholic beverage, and no one had consumed more than one and a half beers.

Of course, not everyone saw, remembered, or described exactly the same details at trial. For example, Knapp positively identified defendant as the man holding the rifle but never saw a second robber. All other witnesses saw both men, but most of them did not get a good look at defendant's accomplice. Tomassini was able

to describe what both men were wearing in the greatest detail, and she was the only person who mentioned the khaki clothes and hairnets. In contrast, Malstrom though defendant might have been wearing a "watchcap," and he did not notice anything on the other robber's head. In addition, while Tomassini believed the incident lasted 10 to 15 minutes, all other witnesses estimated that it lasted 5 minutes or less. As noted, only Boone suggested the defendant's accomplice was armed.

The prosecution also introduced the testimony of Police Officer Pavek who arrived at the scene shortly after the robbery. He testified that the bar was "in shambles," that there were bloodstains on the floor, and that three casings and two expended bullets from a .22 caliber weapon were found inside. Other details about the investigation were not presented at trial.

The defense presented no evidence at the guilt phase.

II. Penalty Phase Evidence

A. *Prosecution Case*

The prosecution presented evidence of several prior crimes and misdeeds by defendant. None were adjudicated, and all occurred while defendant was in custody, primarily with the California Youth Authority (CYA). Defendant's objections to this evidence will be discussed later in the opinion.

1. *Assault – 1982.* Sam Fong, a CYA counselor, testified that in May 1982, he witnessed a fistfight between defendant and another ward, Gages. Fong restrained

defendant with a chokehold, and another counselor pulled Gages aside. Gages sat down and began "tending to his wounds." When Fong eased his chokehold, defendant lunged at Gages but was quickly subdued again by Fong, Defendant threatened to "get" Gages and "the Northerners," and ordered a nearby comrade to get a knife.

Fong explained that rival gangs from the "North and South" populated the facility, and that Gages was from the North and defendant was from the South. Fong also noted that even though wards were prohibited from possessing knives, they were sometimes made or smuggled inside. A search revealed no knife in the possession of defendant or his comrade. However, the fight between defendant and Gages violated institutional rules and was reported.

2. *Threats – 1982.* In July 1982, Debra Heron worked as a counselor at a maximum security CYA facility. Heron testified that defendant became verbally abusive when she patrolled the hall outside his cell two different nights. His remarks consisted of sexual taunts and death threats (e.g., "[I'm] going to fuck [you] in [your] fat white ass, bitch" and "rape [you] and [you will] like it" and "kill you [and] your Momma, too"). During one of the episodes, defendant threw a liquid substance against a screened area of the cell – "tomatoes and possibly water or urine or something of that nature." Cell doors were locked on both occasions. Heron did not believe she was in imminent danger, but defendant's remarks violated institutional rules and were reported.

3. *Weapons possession – 1984.* CYA counselor Lester Kushner testified that in October 1984, he noticed the

"remains of some broken razors" in defendant's cell or on the floor nearby. Institutional rules precluded wards from possessing more than one razor and from removing the blade. A search revealed two razor blades and two other intact razors on defendant's person. "[O]ther contraband indicating gang-related type items" and several batteries taped together were also found in defendant's cell. Kushner explained that the latter item, "a battery pack," was typically held in the hand and used as a punching or striking device. Defendant was the sole occupant of the cell in which the foregoing items were found. Possession of them violated institutional rules and was reported.

4. *Threat – 1984.* CYA employee Gregory Bron testified that in November 1984, defendant attended class wearing pants in which the seams had been cut. Bron escorted defendant to his quarters, confiscated the pants, and told defendant he would be issued a new pair and cited for destroying state property. Defendant said he would burn the pants and burn Bron's face. Bron explained that other wards had previously injured staff by igniting "match bombs," i.e., small container packed with severed matchheads Bron did not believe he was in imminent danger, but defendant's remarks violated institutional rules and were reported.

5. *Threats – 1985.* In September 1985, Michelle McDowell Roberts worked as a supervisor at a maximum security CYA facility. Roberts testified that defendant became verbally abusive when she patrolled the hall outside his room two different nights. He threatened some sort of torture and death, and sexually taunted her (e.g., "how would I like his dick up my ass"). On both occasions, defendant was locked in a room or cell. Roberts

apparently did not believe she was in imminent danger, but defendant's remarks violated institutional rules and were reported.

6. *Assault – 1986.* Robert Sedillo, a CYA supervisor, described an incident that occurred when he escorted defendant from the infirmary in May 1986. Defendant kicked another ward in the face as he sat in the hallway waiting for a medical appointment. The attack appeared to be unprovoked, and both defendant and his victim had their hands handcuffed behind their backs at the time. The assault violated institutional rules and was reported.

7. *Robbery and assault – 1987.* Daniel Chatters and defendant shared a cell in the courthouse lockup at the time of trial in this case. Chatters testified that a few days before his testimony, defendant became angry when Chatters would not give money to defendant. Defendant repeatedly struck and injured Chatters, and took $12 that Chatters was carrying on his person.

B. *Defense Case*

1. *Family history.* Defendant's mother, Mrs. Tuilaepa, and his sister Sanita testified as follows: Defendant was raised in a two-parent home and is the youngest of twelve children. The family moved to the United States from Samoa when defendant was a boy. Mrs. Tuilaepa never learned to speak English, and the family apparently communicates in Samoan.

Defendant was purportedly well behaved as a child. However, he began getting into trouble with his friends

at age 14 or 15, and was periodically removed from the home by authorities.

The family has experienced many difficulties over the years but has apparently remained close. Defendant's father died a few years before the capital trial, and one of defendant's brothers was shot and killed in a fight. Another brother, Joe, was shot at a party and is now paralyzed and confined to a wheelchair. As adults, defendant and Joe lived with their mother, and defendant assisted in Joe's care. Sister Sanita and her husband were active in the church and, along with their children, lived with Mrs. Tuilaepa. Several family members regularly attended the capital trial. Mrs. Tuilaepa and Sanita testified that the family cares for defendant and wants his life to be spared.

2. *Expert testimony.* Dr. Maloney, a psychologist, performed various psychological and intelligence tests on defendant and interviewed members of his family. Dr. Maloney saw no sign of "neurological disability," but noted defendant appeared depressed and reticent when interviewed. Defendant performed poorly on verbal tests and received an IQ score in the low 70's placing him in the bottom 5 percent of the population. However, on test of nonverbal reasoning, defendant performed in the normal range. Dr. Maloney concluded that defendant has "normal intellectual potential" but is deficient in his knowledge and understanding of English. The results were "not surprising" since defendant spent the first few years of his life in Samoa and the family communicates primarily in Samoan. Dr. Maloney testified that defendant has the mental capacity to understand that homicide is wrong.

III. Guilt Phase Issue

Defendant challenges the guilt judgment solely on the ground he was improperly shackled in the trial court. For reasons we will explain, no prejudicial error occurred.

A. *Background*

The contemporaneous record of proceedings before and during trial is silent on whether defendant was shackled or physically restrained.

Appellate counsel raised the shackling question towards the end of a record settlement and correction hearing held about a year after the penalty verdict was rendered. The hearing was conducted by the judge who presided at trial and took place in the same courtroom. The district attorney who prosecuted the case and defendant's trial and appellate counsel were also present.

In response to appellate counsel's request for a stipulation on whether defendant was restrained during trial, the district attorney, trial counsel, and the court orally agreed that defendant's ankles were always shackled in some manner, but that his chair was pushed "all the way" under the table so the jury could not see his feet. None of these participants recalled any handcuffs or chains on defendant's wrists, hands, or waist in the jury's presence. The district attorney and trial counsel maintained that defendant entered and exited the courtroom through a rear door that was evidently private, and that the jury "always" waited outside in the hallway until defendant was seated and his ankle restraints were presumably

hidden from view. In response to a specific reference in the record on voir dire, no one recalled whether defendant actually stood up and faced prospective jurors while shackled.[3]

Trial counsel testified at the record settlement hearing in a manner consistent with the foregoing stipulated facts. Counsel further recalled under oath that defendant was thought to be dangerous and a flight risk during trial because he and a brother in attendance were gang members.

Defendant testified at the same hearing but gave a somewhat different version of events. Defendant said he always wore ankle shackles and occasionally wore handcuffs and a waistchain in the courtroom and courthouse. Defendant claimed he "sometimes" entered the courtroom through the private door and "sometimes" entered through the outer hallway. Defendant testified that, on some of the latter occasions, he could "see jurors" in the hall. He did not say whether they were jurors in his case or whether they saw him.

Over the district attorney's objection, appellate counsel was allowed to conduct an "experiment" in an effort to "settle" the record as to whether defendant's restraints could have been seen by the jury. At the direction of appellate counsel, trial counsel stood and sat in the "general area" of the jury box and said he could see the waist

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[3] The record indicates that, during voir dire, the court asked defendant to stand up and turn towards prospective jurors "if you can." Appellate counsel suggests here, as at the record settlement hearing, that this language implies defendant was restrained at the time.

chain and ankle shackles defendant was then wearing. The district attorney and trial counsel each observed, however, that some of the furniture, particularly defendant's chair, was not in the same position during the experiment as during trial.

Appellate counsel also moved to take photographs of the courtroom and send a questionnaire to jurors asking whether defendant had been restrained during trial. The district attorney objected on grounds such matters could not properly be included in the appellate record. The court agreed and denied defendant's request.

The court did not make any findings or issue a settled statement about shackling after the hearing.

B. *Analysis*

(1) Based on the foregoing facts, defendant assumes he was subjected to physical restraints that were visible to the jury. Defendant observes there was no evidence or finding of a "manifest need" for such security measures and no instruction informing the jury to disregard the restraints as required by *People v. Duran* (1976) 16 Cal.3d 282, 291-292 [127 Cal.Rptr. 618, 545 P.2d 1322, 90 A.L.R.3d 1]. According to defendant, noncompliance with *Duran* prejudicially violated his rights under the Fifth, Sixth and Eighth Amendments to the federal Constitution and comparable provisions of the state Constitution (art. I, § 7) and statute (§ 688).

We disagree. It is settled that the use of physical restraints in the trial court cannot be challenged for the first time on appeal. Defendant's failure to object and

make a record below waives the claim here. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 95 [270 Cal.Rptr. 817, 793 P.2d 23]; *People v. Walker* (1988) 47 Cal.3d 605, 629 [253 Cal.Rptr. 863, 765 P.2d 70]; *People v. Duran, supra,* 16 Cal.3d 282, 289.)

In apparent recognition of the waiver problem, defendant argues trial counsel was ineffective in failing to object to the use of restraints. However, counsel's performance could not possibly have affected the outcome at trial. The guidelines imposed by *People v. Duran, supra,* 16 Cal.3d 282, 290, are intended, in large part, to avoid prejudice in the minds of jurors where a defendant appears or testifies in obvious restraints, or where the restraints deter him from taking the stand in his own behalf. We have consistently found any unjustified or unadmonished shackling harmless where there was no evidence it was seen by the jury. (*People v. Cox* (1991) 53 Cal.3d 618, 652 [280 Cal.Rptr. 692, 809 P.2d 351] [defendant's handcuffs and leg braces not seen by jury]; *People v. Medina* (1990) 51 Cal.3d 870, 897-898 [274 Cal.Rptr. 849, 799 P.2d 1282] [same]; see also *People v. Allen* (1986) 42 Cal.3d 1222, 1264 [232 Cal.Rptr. 849, 729 P.2d 115] [shackles of defense witness not seen by jury]; *People v. Fierro* (1991) 1 Cal.4th 173, 220 [3 Cal.Rptr.2d 426, 821 P.2d 1302] [defendant's handcuffs and shackles not seen by key prosecution witness at preliminary hearing].) In *Cox* and *Medina,* we also found no evidence the restraints influenced the defendant's decision not to take the stand.

Nothing in the record on appeal clearly establishes that the jury did or could see defendant's restraints. The court and counsel agreed that efforts had been taken to

conceal defendant's ankle shackles from the jury whenever he appeared in court. Defendant's posttrial "experiment" did not conclusively show such efforts had failed. Defendant's version of events also implied, at most, that jurors might have seen him handcuffed and/or shackled in the hallway of the courthouse and might have assumed such restraints were not removed during trial. However, the trial court made no findings in this regard and never credited defendant's account. In addition, defendant did not testify at any phase of trial and there is no indication he would have testified but for the restraints.

Even assuming the jury saw the restraints under the circumstances suggested by defendant, the result remains the same. Prejudicial error does not occur simply because the defendant "was seen in shackles for only a brief period either inside or outside the courtroom by one or more jurors or veniremen." (*People v. Duran, supra,* 16 Cal.3d 282, 287, fn. 2.) The judgment was reversed in *Duran* based on multiple errors in a close case, including improper exclusion of evidence, restrictive cross-examination, and the heavy shackling of a defendant who took the stand and whose credibility was presumably damaged as a result. (*Id.*, at pp. 295-296.) In subsequent cases, however, visible shackling did not warrant reversal of the judgment. (*People v. Sheldon* (1989) 48 Cal. 3d 935, 946 [258 Cal.Rptr. 242, 771 P.2d 1330]; *People v. Rich* (1988) 45 Cal.3d 1036, 1084-1085 [248 Cal.Rptr. 510, 755 P.2d 960].)

The instant case is analogous to *Sheldon* and *Rich.* Strong guilt evidence in the form of eight positive eyewitness identifications established that defendant shot four individuals and killed one of them in the course of robbing people in a neighborhood bar. No other guilt

errors are raised on appeal or are evident from the record, and no prejudicial error occurred at the penalty phase for reasons we will explain. Defendant elected not to testify in his own behalf. Any glimpse jurors might have received of the restraints as defendant entered the courtroom could not possibly have shocked them or affected their assessment of the evidence.[4]

(2) Defendant also argues the trial court erred in denying his posttrial motion to "settle" the record with photographs of the courtroom and jury questionnaires about shackling. Defendant insists he was deprived of his right to an adequate record and meaningful appeal as a result.

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[4] Defendant asks that we take judicial notice of two juror declarations, one by Foreman Sheby and the other by Alternate Juror Shilinga. Although the declarations differ in several respects, Sheby and Shilinga agree that they occasionally saw defendant enter the courtroom in some type of restraints and neither one says the restraints were thereafter removed.

Contrary to what defendant argues, the facts asserted in the declarations are subject to dispute, are not readily verifiable, and are not the proper subject of judicial notice. (Evid. Code, § 452, subd. (h); see also Evid. Code, § 459.) The declarants themselves disagree on the frequency and type of restraints, and they do not uniformly describe the vantage point from which the restraints were allegedly seen. Similar discrepancies also exist between the juror declarations on the one hand and the facts as remembered by the court and counsel at the record settlement hearing on the other hand.

In any event, the declarations add little to defendant's posttrial testimony suggesting jurors might have seen his restraints as he entered the courtroom. No prejudice is shown for reasons already stated.

We disagree. The rules authorizing settlement, augmentation, and correction of the record on appeal concern documents "file[d] or lodged" in the superior court and transcripts of "oral proceedings" that occurred therein. (Cal. Rules of Court, rules 7(b), 12(a), 36(b).) These provisions – much like the entire network of rules governing matter properly included in the appellate record – are intended to ensure that the record transmitted to the reviewing court preserves and conforms to the proceedings actually undertaken in the trial court. (See, e.g., *People v. Pinholster* (1992) 1 Cal.4th 865, 922 [4 Cal.Rptr.2d 765, 824 P.2d 571] [settled statement of unreported bench conferences between court and counsel]; *People v. Wright* (1990) 52 Cal.3d 367, 401, fn. 6 [276 Cal.Rptr. 731, 802 P.2d 221] [settled statement of unreported bench discussion between court and juror]; *People v. Holloway* (1990) 50 Cal.3d 1098, 1116 [269 Cal.Rptr. 530, 790 P.2d 1327] [settled statement of unreported in-chambers discussion between court and counsel].) The settlement, augmentation, and correction process does not allow parties to create proceedings, make records, or litigate issues which they neglected to pursue earlier.

Because there were no motions or oral proceedings concerning shackling in the trial court, there was nothing for the parties to "settle" here. Defendant is entitled to an appellate record that accurately reflects what was done and said in the trial court – not what he wishes had been done or said. It follows that all of defendant's posttrial efforts to create a record on this issue were unauthorized and incompetent. Hence, the trial court's decision to bar some of these efforts, namely photographs and questionnaires, cannot warrant reversal of the judgment.

IV. Penalty Phase Issues

A. *Death-qualifying Voir Dire*

At defendant's request, the court limited voir dire on the death penalty to four standard questions based on *Witherspoon v. Illinois* (1968) 391 U.S. 510 [20 L.Ed.2d 776, 88 S.Ct. 1770] (*Witherspoon*). Under *Witherspoon*, a prospective juror can be excluded for cause where he makes it "unmistakably clear" he would "automatically" vote a certain way on penalty. (*Id.*, at p. 522, fn. 21 [20 L.Ed.2d at p. 785].) A juror with such views is also "substantially impair[ed]" and excludable under *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [83 L.Ed.2d 841, 851, 105 S.Ct. 844] (*Witt*). *Witt* clarified *Witherspoon* and was decided before jury selection began in this case.

The court instructed prospective jurors before individual voir dire began (see *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80 [168 Cal.Rptr. 128, 616 P.2d 1301]) that they were to give yes or no answers to the foregoing questions. During each individual session, the court typically presented the *Witherspoon* questions, sought some clarification, and then permitted counsel to ask follow-up questions.

(3) Defendant first challenges the manner in which the court questioned three prospective jurors (Maloney, Harris, Donlan). Defendant insists the court "coerced" them into answering "yes" to the *Witherspoon* questions that sought to ascertain a pro-life bias. Defendant also contends the court failed to vigorously pursue whether the "yes" answers given were sincere and unequivocal. The prosecutor successfully challenged Maloney and

Harris for cause, and used a peremptory challenge to strike Donlan.

We see no error in the court's voir dire. As to all three jurors, the court indeed urged a definitive answer where an equivocal or ambiguous one was initially given, or reasked the question in a slightly different way when a "yes" answer was given. However, the questions logically called for a definitive answer, and there was nothing inherently coercive in the court's method. We can only assume the court ended questioning when it determined that the "yes" answer given by each juror was sincere. No restrictions were placed on defendant's right to question them further.

(4) Defendant contends trial counsel was ineffective in failing to sufficiently rehabilitate five prospective jurors who indicated to the court that they were predisposed against the death penalty (Maloney, Harris, Haley, Groeppel, and Sedlack). The prosecutor successfully challenged all of them for cause.

Nothing in the record indicates that counsel lacked a plausible, tactical reason for asking these individuals few or no follow-up questions. (See, e.g., *People v. Lewis* (1990) 50 Cal.3d 262, 289-290 [266 Cal.Rptr. 834, 786 P.2d 892].) Indeed, counsel might have determined from the demeanor of these prospective jurors that additional questioning would be futile. Counsel might also have reasonably concluded that any ambiguity in the answers they had already given would be beneficial and would

promote retention of pro-life jurors.[5] No constitutional deficiency in counsel's performance on voir dire has been shown.[6]

B. *Boyd Claim*

Defendant challenges several unadjudicated acts of misconduct admitted in the prosecution's case-in-chief at the penalty phase. Defendant observes that "criminal activity" involving the "use or attempted use of force or violence or the express or implied threat to use force or violence" is admissible under section 190.3, factor (b) (hereafter factor (b)). Defendant argues here, as he did to some extent below, that the challenged evidence does not

[5] For example, in response to the court's questioning, prospective Juror Harris ambiguously indicated that she had "mixed" feelings about the death penalty and believed it was appropriate "in some cases," but that she would "automatically" refuse to consider or vote for it in the instant case. Defense counsel then asked Harris whether any preference for life imprisonment extended to "every" case, and she said, "yes." Counsel asked no further questions. He could reasonably have concluded that further inquiry along these lines might only solidify Harris's apparent pro-life bias and increase the likelihood that she would be excused.

[6] Defendant also argues trial counsel was ineffective because he did "nothing" to explore prospective jurors' attitudes towards racial prejudice. However, counsel has no duty in the abstract to inquire on a particular subject. There is also no indication that any biased individual actually sat on defendant's jury.

satisfy the "crime" and/or "violence" requirement of factor (b), and that it was therefore irrelevant to any statutory aggravating factor. (*People v. Boyd* (1985) 38 Cal.3d 762, 772-778 [215 Cal.Rptr. 1, 700 P.2d 782].)[7]

(5) On appeal, such claims must be rejected where there is substantial evidence from which a jury could conclude beyond a reasonable doubt that violent criminal activity occurred. (*People v. Boyd, supra,* 38 Cal.3d at p. 778.) As we will explain, no prejudicial error occurred in this post-*Boyd* penalty trial.

1. *Assault – 1982.* (6) Defendant first complains about Fong's testimony describing a fistfight between defendant and another CYA inmate. Defendant recognizes that evidence of a "jailhouse scuffle" is admissible under factor (b) where the jury could conclude the defendant was not acting in self-defense and was therefore guilty of criminal assault. (*People v. Lucky* (1988) 45 Cal.3d 259, 291 [247 Cal.Rptr. 1, 753 P.2d 1052].) Defendant appears to concede that Fong's "scuffle" testimony was admissible under *Lucky,* but asks us to reconsider that rule.

We decline to do so. The Attorney General correctly observes that defendant did not object to this evidence on any grounds at trial, and has therefore waived the claim. (*People v. Mickle* (1991) 54 Cal.3d 140, 186 [284 Cal.Rptr. 511, 814 P.2d 290].) In any event, Fong's testimony strongly suggests that defendant was not only a willing

[7] For the most part, any *Boyd* objections raised below were handled in an evidentiary hearing held before the start of the penalty trial.

combatant but the aggressor in the incident. (*People v. Lucky, supra,* 45 Cal.3d 259, 291.) Defendant apparently had the upper hand in the fight because only his opponent, Gages, was injured. Even after defendant was restrained and Gages retreated to nurse his wounds, defendant attempted to inflict additional harm and threatened future retaliation when officials intervened a second time. The penalty jury was entitled to know that defendant engaged in such disruptive, assaultive behavior in custody.

(7) Defendant also insists the court erred in allowing Fong to suggest that defendant's threat against Gages and other "Northerners" was a gangland reference, and that the two combatants were affiliated with rival groups. Defendant insists this evidence was irrelevant and prejudicial, and that it should have been excised from any otherwise admissible portions of Fong's testimony.

Lack of an objection at trial waives the claim on appeal. And, contrary to defendant's suggestion on the merits, nothing bars evidence of gang affiliation that is directly relevant to a material issue. (Compare *Dawson v. Delaware* (1992) 503 U.S. ___ [117 L.Ed.2d 309, 318, 112 S.Ct. 1093, 1098]; *People v. Cardenas* (1982) 31 Cal.3d 897, 904-906 [184 Cal.Rptr. 165, 647 P.2d 569].) Testimony linking defendant and Gages to rival gangs was admissible because it tended to explain the reason for the fight. (*See People v. Melton* (1988) 44 Cal.3d 713, 757 [244 Cal.Rptr. 867, 750 P.2d 741].) We have only suggested a contrary result under factor (b) where no connection between prison gangs and violent prison crime was made. (See, e.g., *People v. Malone* (1988) 47 Cal.3d 1, 30 [252 Cal.Rptr. 525, 762 P.2d 1249].) Here, the jury was entitled to know

that the assault on Gages was evidently not the product of a personal grievance but of a larger social evil.

2. *Weapons possession – 1984.* (8) Defendant next challenges Kushner's testimony describing several unauthorized items found in defendant's CYA cell. Defendant claims that, because the extra razors and razor blades and the "battery-pack" are not inherently "deadly," there was insufficient evidence from which the jury could infer he violated laws prohibiting possession of deadly weapons by inmates. (See, e.g., § 4574, subd. (a).) Defendant also suggests mere possession of even a deadly weapon does not involve the threat of violence. He does not dispute that discovery of the items on his person and his cell amounted to "knowing" possession.

We reject the Attorney General's suggestion that the claim has been waived. Defendant preserved the issue by raising a similar, comprehensive challenge to the "razor incident" before the evidence was admitted at trial.

Nevertheless, the claim fails on the merits. It is settled that a defendant's knowing possession of a potentially dangerous weapon in custody is admissible under factor (b). Such conduct is unlawful and involves an implied threat of violence even where there is no evidence defendant used or displayed it in a provocative or threatening manner. (*People v. Ramirez* (1990) 50 Cal.3d 1158, 1186-1187 [270 Cal.Rptr. 286, 791 P.2d 965]; *People v. Lucky, supra,* 45 Cal.3d 259, 291-292; *People v. Harris* (1981) 28 Cal.3d 935, 962-963 [171 Cal.Rptr. 679, 623 P.2d 240].) The trier of fact is free to consider any "innocent explanation" for defendant's possession of the item, but such inferences do not render the evidence inadmissible per

se. (*People v. Mason* (1991) 52 Cal.3d 909, 956-957 [277 Cal.Rptr. 166, 802 P.2d 950].) Hence, the court did not err in admitting evidence about the razors and blades and the "battery-pack" found in defendant's possession while in CYA custody.

(9) Defendant also argues that Kushner's related testimony about "contraband" of a "gang-related" nature was inadmissible because there was no evidence defendant's possession of these unspecified items was criminal or involved any threat of violence. We agree. However, the reference to "contraband" was brief and vague and could not have been prejudicial in light of other more serious evidence of defendant's misconduct in custody, namely, weapons possession, three separate assaults, and one robbery. Similarly, Kushner's reference to the possession of "gang" paraphernalia was cumulative given other properly admitted testimony about the gang-motivated assault upon Gages.

3. *Threats – 1982, 1984, 1985.* As noted, the prosecution introduced evidence of several outbursts while in CYA custody. Two female supervisors, Heron and Roberts, testified that defendant was locked in his cell in a maximum security facility at the time he made sexual taunts and death threats, and Roberts said defendant threw a vile liquid against a screened area of the cell during one of the episodes. A male adviser, Bron, testified that he reprimanded defendant for cutting the seams on his pants and that defendant threatened to burn the pants and burn Bron's face. Bron also mentioned the use of "match bombs" by other inmates.

(10) Defendant challenges testimony by all three witnesses recounting his in-custody statements. He relies on the general notion that abusive and even threatening language does not violate a penal statute and is inadmissible under factor (b). (See *People v. Wright, supra,* 52 Cal.3d 367, 425-426 and cases cited.) Defendant also argues that evidence of other circumstances surrounding the outbursts was not independently admissible, e.g., thrown liquid, torn pants, unrelated "match bomb" incidents, and defendant's maximum security status.

Some of these *Boyd* claims have been waived. At trial, defendant challenged the "threat" testimony given by Heron and Roberts, but did not repeat the objection when the admissibility of Bron's testimony was raised later in the proceedings. Defendant also did not make and preserve objections to any other details described by these witnesses.

On the merits, we disagree with the Attorney General's claim that the threats violated section 71, which prohibits certain threats against public employees.[8] There was no substantial showing that defendant harbored the requisite intent – interfering with the performance of official duties – or that his statements had the requisite effect – creating a reasonable belief the threat would be

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[8] Section 71 provides that "[e]very person who, with intent to cause, attempts to cause, or causes, . . . any public officer or employee to do, or refrain from doing, any act in the performance of his duties, by means of a threat, directly communicated to such person, to inflict an unlawful injury upon any person or property, and it reasonably appears to the recipient of the threat that such threat could be carried out," is guilty of a crime.

carried out. (*People v. Boyd, supra,* 38 Cal.3d 762, 777.) Defendant had no apparent history of attacking or injuring CYA officials, and the recipients of these threats indicated they did not actually fear for their safety. Defendant was locked in his cell for the night when he harassed the two women, and his response to Bron's criticism was obviously intended as an angry retort.

We are also not persuaded by the Attorney General's attempt to characterize the act of throwing liquid in Heron's presence as an assault and battery. Nothing in the record suggests the liquid touched her or was even thrown in her direction. (Compare *People v. Pinholster, supra,* 1 Cal.4th 865, 961 [act of throwing urine in deputy's face is admissible under factor (b)].) This incident, like the damaged pants seized by Bron, can only reasonably be construed as inadmissible property damage. (*People v. Boyd, supra,* 38 Cal.3d 762, 776-777.) In addition, Bron's reference to "match bomb" injuries inflicted by other inmates was irrelevant absent any evidence connecting defendant to these events. The "maximum security" status described by the two female witnesses did not provide context for any other admissible act.

(11) Nevertheless, the foregoing testimony was harmless. At most, it suggested defendant had difficulty submitting to authority and controlling his violent impulses. The jury could draw the same unfavorable character inferences from evidence properly admitted in aggravation. The circumstances of the capital crime included defendant's attempt to kill four bar patrons in a gratuitous and cold-blooded manner. Admissible background evidence also showed a pattern of nonconforming

and violent behavior, namely three assaults and the possession of potentially dangerous weapons while in custody. At least two of the assaults were unprovoked, two occurred in the presence of CYA officials, and one was incidental to a robbery. There is no reasonable possibility the penalty verdict would have been different absent evidence of threats and insults against CYA personnel.

C. *"Other-crimes" Instruction*

The court gave the standard instruction prohibiting the jury from considering other violent crimes admitted in aggravation under factor (b) unless they had been proven beyond a reasonable doubt. The instruction did not describe or otherwise identify any of the acts to which it might apply. Both the prosecutor and defense counsel requested and approved the instruction as given.[9]

(12) Defendant claims the trial court erred in not including in the instruction the names and elements of the crimes offered by the prosecution under factor (b).

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[9] The instruction said, in full: "Evidence has been introduced for the purpose of showing that defendant Tuilaepa has committed criminal acts which involved the express or implied use of force or violence or the threat of force or violence. Before you may consider any of such criminal acts as an aggravating circumstance in this case, you must first be satisfied beyond a reasonable doubt that the defendant did in fact commit such criminal acts. You may not consider any evidence of any other criminal acts as an aggravating circumstance." (See CALJIC No. 8.84.1.2 (1983 new).)

Defendant argues that, absent such a "frame of reference," the jury might have improperly based their penalty determination on acts which were not criminal or violent or which had not been proven to the requisite level of certainty. Defendant claims his constitutional rights to due process and a reliable penalty determination were violated as a result.

However, as defendant seems to concede, it was settled even before the penalty trial in this case that the trial court has no sua sponte duty to instruct in the manner now urged. (*People v. Hardy* (1992) 2 Cal.4th 86, 205-207 [5 Cal.Rptr.2d 796, 825 P.2d 781]; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1075 [5 Cal.Rptr.2d 230, 824 P.2d 1277]; *People v. Davenport* (1985) 41 Cal.3d 247, 281-282 [221 Cal.Rptr. 794, 710 P.2d 861]; *People v. Phillips* (1985) 41 Cal.3d 29, 68 & 72-73, fn. 25 [222 Cal.Rptr. 127, 711 P.2d 423].) The rule recognizes that, for tactical reasons, defendants in the vast majority of cases do not want to risk highlighting prior violent crimes or alienating the jury with hypertechnical defenses to bad acts which otherwise seem clearly aggravating. Hence, in the absence of a request from the defense, the court did not err in failing to give a more detailed factor (b) instruction.

Defendant claims counsel's failure to request such an instruction amounted to ineffective assistance. However, nothing in the record indicates counsel lacked a plausible tactical reason for failing to request additional instruction on aggravating crimes and elements. (*People v. Pope* (1979) 23 Cal.3d 412, 426, fn. 16 [152 Cal.Rptr. 732, 590 P.2d 859, 2 A.L.R.4th 1].) To the contrary, the record suggests counsel sought to deemphasize the significance of defendant's misconduct while in CYA custody. Counsel stressed in

closing argument that defendant had no prior felony convictions, and that any unadjudicated CYA violations might have been "distateful" but were forgivable given defendant's youth at the time. Defendant has not met his burden of establishing constitutionally deficient representation in counsel's failure to request an instruction highlighting the conduct the jury could consider under factor (b).

In any event, we reject defendant's claim that he was prejudiced by the lack of such an instruction. Our review of the record discloses convincing evidence of all criminal conduct properly admitted under factor (b) – the fight with inmate Gages, the unprovoked assault on another ward outside the infirmary, the assault and robbery of inmate Chatters, and the possession of potentially dangerous weapons while in CYA custody. There is no indication that an instruction on specific crimes and elements would have changed the jury's assessment of evidence admitted under factor (b) or would have affected the outcome at trial.

D. *Instruction on Sentencing Discretion*

The court gave the 1986 version of CALJIC No. 8.84.2. The instruction explains the manner in which the jury is to weigh the aggravating and mitigating circumstances and select the appropriate punishment, and was drafted in response to *People v. Brown* (1985) 40 Cal.3d 512 [220 Cal.Rptr. 637, 709 P.2d 440] (revd. on other grounds *sub nom. California v. Brown* (1987) 479 U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837]). (13) At issue here is a portion of the instruction saying that "[to] return a judgment of

death, each [juror] must be persuaded that the aggravating evidence is *so substantial* in comparison with the mitigating [evidence] that it warrants death instead of life without parole." (Italics added.)[10] On its written verdict form, the jury specifically found that aggravation "substantially outweigh[ed]" mitigation.

Defendant notes that the instruction, as given, did not contain language from section 190.3 saying that the

[10] The instruction stated, in full: "It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant. [¶] After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. [¶] The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole. [¶] You shall now retire and select one of your number to act as foreman, who will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree." (See CALJIC No. 8.84.2 (1986 rev.).)

jury "shall impose" life imprisonment if it finds mitigation outweighs aggravation. Defendant argues that omission of this language and the alleged ambiguity of the "so substantial" language gave the jury unfettered discretion to impose death. He insists these instructional features violated the due process, ex post facto, and cruel and unusual punishment clauses of the federal and state Constitutions.

We disagree. As noted, the instruction used language suggested by *People v. Brown, supra,* 40 Cal.3d 512, 541-542, footnote 13. There, we noted that because aggravating and mitigating circumstances are weighed in the context of determining which of the law's two most serious penalties applies, the jury must understand that the decision is not whether the "bad" evidence outweighs the "good" but whether defendant is deserving of the most severe punishment – death. Consistent with *Brown,* the instructional language makes manifestly clear that death may be imposed *only* where aggravation "so substantially" outweighs mitigation that death, rather than life imprisonment, is appropriate. The converse principle emphasized by defendant here – that the jury must impose life imprisonment in all other circumstances – is obvious, and no reasonable jury could have been misled in this regard.

We used the same reasoning to reject a similar attack on the same instructional language in *People v. Duncan* (1991) 53 Cal.3d 955, 978 [281 Cal.Rptr. 273, 810 P.2d 131]. Defendant asks us to reconsider *Duncan,* but we see no reason to do so. We conclude the jury was properly instructed on the scope of its sentencing discretion.

E. *Constitutionality of the Death Penalty Law*

(14) Defendant broadly attacks the constitutionality of section 190.3, which enumerates the factors deemed relevant to the capital sentencing determination. Defendant argues that submission to the penalty jury of factors (a) (circumstances of the capital crime), (b) (other violent criminal activity), and (i) (defendant's age at time of crime), without further clarifying language not identified here, precludes a meaningful and guided distinction between those murders that warrant the death penalty and those that do not.[11] Assuming without deciding that section 190.3 is subject to such "vagueness" concerns (see *Stringer v. Black* (1992) 503 U.S. ___ [117 L.Ed.2d 367, 112 S.Ct. 1130]), we reject this claim.

It is settled that the "facts and circumstances of the defendant, his background, and his crime" are relevant to the sentencing decision (*Clemons v. Mississippi* (1990) 494 U.S. 738, 748 [108 L.Ed.2d 725, 738, 110 S.Ct. 1441]), and that the state, within certain limits, has broad latitude to decide how such facts are to be presented and considered at the penalty phase (*Payne v. Tennessee* (1991) 501 U.S. ___ [115 L.Ed.2d 720, 735, 111 S.Ct. 2597]; *Boyde v. California*

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[11] Section 190.3 provides in pertinent part: "In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: [¶] (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true. . . . [¶] (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence. . . . [¶] (i) The age of the defendant at the time of the crime."

(1990) 494 U.S. 370, 377 [108 L.Ed.2d 316, 326, 110 S.Ct. 1190]). By the same token, the individualized penalty determination required by the Eighth Amendment makes inevitable application of the sentencer's own values, perceptions, and experiences to the factors the state properly deems relevant. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 110-112 [71 L.Ed.2d 1, 8-9, 102 S.Ct. 869].)

As we very recently held, the language of factor (a), concerning the "circumstances of the [capital] crime," embodies a consideration that the United States Supreme Court itself has identified as "one of the criteria upon which the jury *should* base its penalty determination," and withstands the type of vagueness challenge raised here. (*People v. Proctor, ante*, 499, 551 [___ Cal.Rptr.2d ___, ___ P.2d ___] and cases cited.) Factor (b) focuses the sentencer's attention on other crimes (i.e., punishable offenses) committed by the defendant involving his use or threatened use of force against any person. (*People v. Phillips* (1985) 41 Cal.3d 29, 72 [222 Cal.Rptr. 127, 711 P.2d 423]; *People v. Boyd* (1985) 38 Cal.3d 762, 776 [215 Cal.Rptr. 1, 700 P.2d 782].) Factor (i) directs the sentencer to consider whether the defendant's age at the time of the capital crime gives rise to inferences about his relative youth or maturity which in "common experience or morality . . . might reasonably inform the choice of penalty. . . . " (*People v. Lucky, supra*, 45 Cal.3d 259, 302.)

By their express terms, factors (a), (b), and (i) thus direct the sentencer's attention to specific, provable, and commonly understandable facts about the defendant and the capital crime that might bear on his moral culpability. Having met these standards of relevance and specificity, factors (a), (b), and (i) are not "illusory" or otherwise

impermissibly "vague" (*Stringer v. Black, supra,* 503 U.S. ___, ___ [117 L.Ed.2d 367, 382]) simply because they leave the sentencer free to evaluate the evidence in accordance with his or her own subjective values.

Defendant also argues that the 1978 death penalty statute is unconstitutional because it lacks adequate safeguards to protect against "arbitrary" death judgments and ensure "guided" sentencing discretion. He concedes we have implicitly or explicitly rejected all of his claims before, but asks us to reconsider our conclusions. (See, e.g., *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-779 [230 Cal.Rptr. 667, 726 P.2d 113].) We affirm that, contrary to defendant's contentions:

1. The jury need not employ the beyond-a-reasonable-doubt standard in deciding whether aggravating factors (other than violent criminal conduct) are present, whether aggravation outweighs mitigation, and whether death is the appropriate sentence;

2. The jury need not make written findings or agree unanimously on the presence of aggravating factors;

3. The jury need not be instructed to presume that life without possibility of parole is appropriate sentence;

4. Existing appellate procedures provide for adequate review of a death judgment.

V. Disposition

The judgment is affirmed in its entirety.

Lucas, C. J., Panelli, J., and George J., concurred.

MOSK, J. – I concur in the judgment. After review, I have found no reversible error or other defect.

I write separately to make two points, one specific to this case and the other of more general applicability.

The first concerns defendant's appointed trial counsel, an attorney who is no stranger to this court. (See, e.g., *People v. Wilson* (1992) 3 Cal.4th 926 [13 Cal.Rptr.2d 259, 838 P.2d 1212]; *In re Wilson* (1992) 3 Cal.4th 945 [13 Cal.Rptr.2d 269, 838 P.2d 1222].) To my mind, counsel's performance was deficient in many regards. That is to say, it failed to satisfy an objective standard of professional reasonableness. Nevertheless, his failings did not subject the defense to prejudice. No reasonable probability existed that a more favorable outcome would have resulted in their absence. Hence, counsel's assistance was not ineffective under either the Sixth Amendment to the United States Constitution or article I, section 15 of the California Constitution. (See generally *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218 [233 Cal.Rptr. 404, 729 P.2d 839] [discussing both federal and state constitutional provisions].)

The second point relates to defendant's claim under *Stringer v. Black* (1992) 503 U.S. ___ [117 L.Ed.2d 367, 112 S.Ct. 1130] (*Stringer*). As I stated in my dissenting opinion in *People v. Proctor, ante,* at page 499 [___ Cal.Rptr.2d ___, ___ P.2d ___]:

"In *Stringer,* the United States Supreme Court held that 'if a State uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion' in

contravention of the Eighth Amendment. [Citation.] It explained: 'Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise context. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance.' [Citation.] Of course, California uses 'aggravating factors' – labeled 'special circumstances' [citation] – to determine death eligibility. It also uses 'aggravating factors' – bearing that very label [citation] – to decide between life and death.

"A narrow *Stringer* challenge could specifically attack any one or more of the factors set out in the standard jury instruction on the determination of penalty as vague and, for that reason, likely to invite an arbitrary and capricious choice of punishment in violation of the Eighth Amendment. . . .

"A broader *Stringer* challenge could generally attack the standard jury instruction on the determination of penalty as vague at its very core and, for that reason, highly likely to invite an arbitrary and capricious choice of punishment in violation of the Eighth Amendment." (*People v. Proctor, supra, ante,* at pp. 566-567 (dis. opn. Mosk, J.).)

Defendant's *Stringer* challenge is narrow. He attacks factor (a), the "circumstances of the crime"; factor (b), the "presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence"; and factor (i), the "age of the defendant at the time of the crime."

At the outset, the majority "[a]ssum[e] without deciding" that the factors set out in the standard jury instruction on the determination of penalty are subject to attack for vagueness under *Stringer.* (Maj. opn., *ante,* at p. 594.) That "assumption" is unnecessary. The United States Supreme Court has all but expressly decided the issue. The factors *are* subject to attack. (See *Bacigalupo v. California* (1992) 506 U.S. ___ [121 L.Ed.2d 5, 113 S.Ct. 32], vacating and remanding *People v. Bacigalupo* (1991) 1 Cal.4th 103 [2 Cal.Rptr.2d 335, 820 P.2d 559], for further consideration in light of *Stringer v. Black, supra,* 503 U.S. ___ [117 L.Ed.2d 367, 112 S.Ct. 1130].)

The majority then proceed to reject defendant's *Stringer* challenge. They do so because they themselves do not find factors (a), (b), and (i) to be vague. But "[w]hat is dispositive is not what jurists on appellate courts may announce, but what laypersons on juries may understand." (*People v. Proctor, ante, supra,* at p. 567 (dis. opn. of Mosk, J.).) In this regard, consider factor (i). We have held that "age" can be aggravating or mitigating or neither depending on the peculiar facts of the individual case. (E.g., *People v. Lucky* (1988) 45 Cal.3d 259, 302 [247 Cal.Rptr. 1, 753 P.2d 1052].) Whether a juror would come to the same conclusion, however is another matter.

In the course of their analysis, the majority appear to suggest that if a factor is not vague, it necessarily passes muster under the United States Constitution, even if it "leave[s] the sentencer free to evaluate the evidence in accordance with his or her own subjective values." (Maj. opn., *ante*, at p. 595.) Such a proposition would be too broad. The requirements imposed by the federal charter are substantive as well as formal. Thus, a factor, no matter how clearly defined, is constitutionally invalid, if for example, it authorizes or allows a juror to "attach[] the 'aggravating' label to" matters "that are constitutionally impermissible or totally irrelevant to the sentencing process, such as . . . the race, religion, or political affiliation of the defendant" or "to conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness." (*Zant v. Stephens* (1983) 462 U.S. 862, 885 (77 L.Ed.2d 235, 255, 103 S.Ct. 2733].)

With that said, I note that a successful *Stringer* challenge does not automatically result in reversal. As *Stringer* itself makes plain, an instruction incorporating a vague factor is subject to harmless-error analysis. (503 U.S. at pp. ___, ___ [117 L.Ed.2d at pp. 379, 383, 112 S.Ct. at pp. 1137, 1140].) On this record, even if one or more of the factors defendant attacks are deemed vague, no prejudice appears.

In conclusion, having found no reversible error or other defect, I concur in the judgment.

KENNARD, J. – I concur in the result and the reasoning of the majority opinion except for its conclusion that, assuming we must evaluate the aggravating factors in

Penal Code section 190.3 to determine whether they are impermissibly vague in violation of the Eighth Amendment, factor (i) ("the age of the defendant at the time of the crime") is not vague. I see no need to resolve this issue here. Because defendant's age played little role in either the evidence or the argument at the penalty phase, any vagueness in the trial court's instruction to the jury on factor (i) was harmless under any standard.

SUPREME COURT OF THE UNITED STATES

No. 93-5131

Paul Palalaua Tuilaepa,

Petitioner,

v.

California

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of California.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 2 presented by the petition. This case is consolidated with No. 93-5161, *William Arnold Proctor v. California*, and a total of ninety minutes is allotted for oral argument.

December 6, 1993

Supreme Court, U.S.
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No. 93-5131

In The

Supreme Court of the United States

October Term, 1993

PAUL PALALAUA TUILAEPA,

Petitioner,

vs.

CALIFORNIA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of California

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Is California's death penalty statute as written and applied impermissibly vague, in violation of the Eighth Amendment, because it permits the sentencer to consider (a) the unadorned "circumstances of the crime" aggravating factor, with no guidance whatsoever; (b) the prior violent criminal activity aggravating factor, without any instruction as to the penal statutes that may have been violated; and (c) the age of the defendant as an aggravating factor, no matter what the defendant's age may be?

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BRIEF FOR PETITIONER

CITATION TO OPINION BELOW

The opinion of the California Supreme Court is reported as *People v. Tuilaepa*, 4 Cal.4th 569, 842 P.2d 1142 (1992), and is located in the Joint Appendix, pages 68-105 (hereinafter "JA ___").

JURISDICTION

The judgment of the California Supreme Court was entered on December 28, 1992. A petition for rehearing was denied on March 10, 1993. The petition for writ of certiorari was filed on July 8, 1993, and granted on December 6, 1993. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1275(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth Amendment to the United States Constitution, which forbids the infliction of "cruel and unusual punishment."

2. It also involves the Fourteenth Amendment to the United States Constitution, which provides in pertinent part that no state may "deprive any person of life- . . . without due process of law. . . . "

3. Also involved are California Penal Code sections 190.2 and 190.3, part of the capital punishment statute in California. These code sections are attached as the Appendix to this brief.

STATEMENT OF THE CASE

Petitioner was convicted and sentenced to die for the October 6, 1986 murder of Melvin Whiddon during the course of an armed robbery at the Wander Inn Tavern in Long Beach, California. On that date, two men entered the tavern, demanded money, and began robbing the customers. Whiddon, a patron sitting at the bar, struck one of the robbers and a fight ensued. The second robber responded by fatally shooting Whiddon. He also shot and seriously injured three other patrons as he and his accomplice exited the bar. Petitioner was identified at trial as the second robber. JA 69-72.

Under California law, a defendant may not be sentenced to death unless convicted of first-degree murder with a finding of a statutory "special circumstance." California Penal Code § 190.2.[1] At petitioner's trial, the jury found petitioner guilty of first degree murder and found true the special circumstance that the murder was committed while petitioner was engaged in the commission

[1] The existence of a special circumstance is determined as part of the guilt phase proceedings. Cal. Pen. Code § 190.1. All statutory references are to the California Penal Code unless otherwise noted.

of a robbery. Clerk's Transcript, page 208 (hereinafter "CT ___").

At a penalty trial before the same jury, the prosecutor introduced evidence of various incidents of in-custody misconduct by petitioner, all but one of which occurred during the four years that petitioner was detained in a California Youth Authority ("CYA") facility. The CYA incidents included destruction of property (Reporter's Transcript, Vol. 4, pages 781-82 (hereinafter "RT ___"), two fights (RT 4:720-26; 765, 779), possession of taped-together flashlight batteries (RT 4:754-55), possession of an unauthorized number of razor blades (RT 4:752-53), tossing a liquid against a screened area of his cell (RT 4:741), yelling obscene and/or otherwise obnoxious taunts and alleged threats at his counselors (RT 4:729-31; 740-41), and possession in his cell of "contraband" ("gang writings"). RT 4:670, 754.[2]

The defense introduced the testimony of a psychologist concerning petitioner's low IQ (in the low 70's), depression, and difficulties in mastering English after moving to California from Samoa. In his early years, petitioner spoke Samoan almost exclusively. After the eighth grade, his schooling was only in various institutional settings. RT 4:826-29. Petitioner's 66-year-old mother, Menoa, who had never learned to speak English, testified through an interpreter that petitioner, the youngest of 12 children, had been well behaved as a child and had only gotten into trouble with friends at age 14 or 15,

[2] The non-CYA incident involved the robbery of an inmate in the courthouse lockup while waiting for trial. RT 4:803-05.

after the family had moved to California. It was around the age of 14 or 15 that petitioner was first "taken away" from her. RT 4:808-12. The family had serious difficulties during the few years before the trial, including the death of petitioner's father and the murder of one of petitioner's brothers. RT 4:810, 815. Petitioner had helped to care for another of his brothers who was paralyzed after being shot in the back. RT 4:814. Petitioner's sister, Sarita, testified that she and her family, many of whom attended court daily, loved and cared for petitioner and wanted his life to be spared. RT 4:820-21.

The trial court instructed the jury that there were five factors which it was to weigh and be guided by in determining if petitioner should die:

> [(a)] The circumstances of the crime in which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true;
>
> [(b)] The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence;
>
> [(c)] The presence or absence of any prior felony conviction;
>
> [(i)] The age of the defendant at the time of the crime.
>
> [(k)] Any other circumstance which extenuates the gravity it [sic] of the crime, even though it is not a legal excuse for the crime. ¶ And any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death whether or not related to the offense for which he is on trial.

JA 60-61; RT 4:885.[3]

The court, after again reminding the jury that it was to be guided by the foregoing "aggravating and mitigating circumstances," told the jury that "in weighing [the] aggravating and mitigating circumstances," it was "free to assign whatever moral and sympathetic value [it] deem[ed] appropriate." RT 4:886-87. Finally, the jury was told that "[i]n weighing the various circumstances," it was to determine which penalty is justified,

> by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.
>
> To return a judgment of death, each of you must be persuaded that the aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

JA 63; RT 4:886-87.

The trial court did not provide any guidance as to what came within the scope of the "circumstances of the

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[3] As read to the jury, these factors were labeled "A" through "E." RT 4:885. To facilitate the Court's consideration of the issues raised in this and the companion case of *Proctor v. California*, No. 93-5161, *cert. granted*, 12/6/93, petitioner has altered the lettering to make the factors correspond to the statutory sentencing factors appearing in Cal. Pen. Code § 190.3. Six of the standard section 190.3 factors were not submitted to petitioner's jury. This was done by agreement of the parties, in recognition of the fact that the omitted factors were irrelevant in light of the trial evidence. RT 4:785-87.

crime" factor, or how the jury was to determine whether the factor was mitigating or aggravating. Nor did the court give any instructions to help the jury determine whether any alleged misconduct involved "criminal" or "violent" activity, or any instruction as to how or why petitioner's "age" might be an aggravating factor.

The prosecutor, in closing argument, relied upon factors (a), (b) and (i) as aggravating circumstances. As to factor (a), he urged that the serious injury to the three surviving victims, a purported smile on petitioner's face during the shootings, and the fact that the crime occurred while the victims were in a bar watching Monday night football and so could "have been any one of us" made the "circumstances of the crime" an aggravating factor. JA 7, 25-27; RT 4:837, 853-57. As to factor (b), the prosecutor relied upon the various incidents of in-custody misconduct. JA 19-24; RT 4:848-52. As to factor (i), the prosecutor argued that petitioner, whom he described as being "in his early twenties," was "old enough . . . to have spent some time incarcerated" and "[s]o, in a criminal sense, . . . ha[d] a certain maturity which belies his years"; and further, that petitioner "was old enough to decide to plan as well as commit a robbery. . . . [;] . . . had enough maturity, enough sophistication to plan and execute a robbery. . . . " JA 11-14; RT 4:841-43.[4]

The prosecutor focused the jury's attention on the fact that the jury's task was to weigh aggravating circumstances against mitigating circumstances. The prosecutor

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[4] Petitioner was 20 or 21 years old at the time of the crime. JA 51; RT 4:877.

quoted the instructional language noted above directing the jury to reach its verdict "by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances [, and deciding whether] the aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death," and the prosecutor characterized this weighing process as "pretty much the essence of the case." JA 8-9; RT 4:839.

Defense counsel's argument also underlined the central importance of the weighing process, noting three times that: "In order to return a verdict of death, you – each of you must be persuaded that the circumstances in aggravation so outweigh the circumstances in mitigation as to warrant the death penalty"; "the aggravating circumstances must so substantially outweigh the mitigating circumstances in order to render a verdict of death" (JA 37; RT 4:864); and "[a]gain, you must be persuaded that the aggravating circumstances are so substantial in nature, are so substantial in comparison with the mitigating circumstances." JA 43; RT 4:870.

The trial court provided the jury with two alternative verdict forms, each of which emphasized the central importance of weighing the aggravating circumstances against the mitigating:

> We, the jury in the above-entitled action, FIND the *aggravating circumstances substantially outweigh the mitigating circumstances* and that the defendant PAUL PALALAUA TUILAEPA should have imposed the sentence of death on him.

JA 66; CT 225 (emphasis added).

> We, the jury in the above-entitled action, FIND that the *aggravating circumstances do not substantially outweigh the mitigating circumstances* and that the defendant PAUL PALALAUA TUILAEPA should have imposed on him confinement in the State Prison for LIFE WITHOUT THE POSSIBILITY OF PAROLE.

JA 67; CT 226 (emphasis added).

After nearly three days of deliberations,[5] the jury found that the aggravating circumstances substantially outweighed the mitigating circumstances and returned the signed verdict of death. JA 66; CT 225; RT 4:892.

On direct appeal to the California Supreme Court, petitioner argued that factors (a), (b), and (i) were unconstitutionally vague in violation of the Eighth Amendment standards which this Court has applied to aggravating circumstances weighed in the capital sentencing process. The state court, "[a]ssuming without deciding" that factors (a), (b), and (i) are "subject to such 'vagueness' concerns," ruled that these factors were not impermissibly vague. JA 98; *People v. Tuilaepa, supra*, 4 Cal.4th at 594-95.

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[5] The jury had difficulty reaching its verdict. On the second day of deliberations, it sent to the trial court the following note, signed by the jury foreperson: "We the jury of 12 have *not* come to a unanimous 12-0 verdict. After 8 1/2 hours of deliberations we feel that further deliberations will not make any difference." JA 65; CT 216 (emphasis in original).

SUMMARY OF ARGUMENT

When a state chooses to impose capital punishment, the Eighth Amendment requires a scheme which makes all reasonable efforts to ensure that the death penalty is not meted out in an arbitrary or capricious manner. Although the Eighth Amendment does not require states to use "aggravating factors" to reach this goal, when the state *does* elect to make such factors central in determining who shall die – as where it requires the sentencer to weigh aggravating and mitigating factors in determining punishment – it may not place vague or illusory aggravators on death's side of the scale.

The instructions, arguments and jury verdicts given to petitioner's jury in this case made clear that the jury was to decide if petitioner should die by weighing aggravating and mitigating factors. Thus, under the Eighth Amendment, the state could not allow the jury to weigh vague or illusory aggravating factors.

Three of the aggravating factors relied upon in this case were impermissibly vague. First, the jury was allowed to formally weigh as an aggravating factor the "circumstances of the crime." Instructions in the bare language of this aggravating factor do not provide the type of specific and detailed guidance required of an aggravating factor. The jury was given no instruction as to what came within the scope of the "circumstances of the crime" aggravating factor, nor any guidance as to what particular "circumstances" society deemed particularly blameworthy. Instead, it was left in the jury's unguided discretion to determine if the "circumstances of

this crime" were sufficiently egregious to constitute an aggravating factor.

Second, the jury was told it could weigh in aggravation "the presence or absence of criminal activity by the defendant which involved the use or threatened use of force or violence. . . . " The jury was not given any instructions as to what constituted "criminal activity" or "violence." In the absence of such instructions, opinions on what constitutes "criminal activity," or "violence" will necessarily vary from juror to juror and jury to jury. Thus, this aggravating factor also failed to provide the type of specific and detailed guidance required in an aggravating factor.

Finally, the jury was allowed to weigh in aggravation petitioner's "age at the time of the crime." The jury was given no guidance as to how or why the petitioner's age might legitimately serve as an aggravating factor. The state supreme court's construction of the "age" factor, albeit never communicated to the sentencing jury, has served only to render this factor all the more impermissibly vague.

Because the presence of even one invalid aggravating factor injects Eighth Amendment error into petitioner's death sentence, the sentence must be reversed and the case remanded.

ARGUMENT

I. The Aggravating Factors Which the Jury Was Explicitly Told to Weigh in Determining if Petitioner Should Live or Die Are Subject to Eighth Amendment Vagueness Limitations

A. In Order To Comply with the Eighth Amendment's Fundamental Proscription against Arbitrary Imposition of the Death Penalty, when a State Requires Its Sentencers To Balance Aggravating and Mitigating Factors in Determining Who Shall Die, It May Not Place Vague Aggravators on Death's Side of the Scale

Perhaps the most fundamental premise underlying this Court's Eighth Amendment capital jurisprudence over the last 25 years has been the Court's repeated observation that death is a unique punishment. *See, e.g., Lewis v. Jeffers*, 497 U.S. 764, 774 (1990); *Tison v. Arizona*, 481 U.S. 137, 149 (1987); *California v. Ramos*, 463 U.S. 992, 998-999 (1983); *Beck v. Alabama*, 447 U.S. 625, 638 (1980); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Gardner v. Florida*, 430 U.S. 349, 357 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Gregg v. Georgia*, 428 U.S. 153, 181-188 (1976); *Furman v. Georgia*, 408 U.S. 238, 306-310 (1972) (Stewart, J., concurring). *See also Harmelin v. Michigan*, 501 U.S. ___, 115 L.Ed.2d 836, 868 (1991) (Kennedy, J., concurring). The Court has repeatedly relied on this fundamental premise to hold that when a state chooses to impose capital punishment, it must utilize procedures that insure the sentence is not meted out in an unreliable, arbitrary manner.

In the earliest application of this principle, the Court held that the Eighth Amendment's proscription against

arbitrary imposition of the death penalty was violated by a capital sentencing scheme which did not provide a meaningful basis for selecting those defendants who would receive a death sentence. *Furman v. Georgia, supra,* 408 U.S. 238. In the years since *Furman* the Court has continued to show its concern "that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Eddings v. Oklahoma,* 455 U.S. 104, 118 (1982) (O'Connor, J., concurring).

There is, of course, no single scheme a state must adopt to meet its constitutional obligations. *Spaziano v. Florida,* 468 U.S. 447, 464 (1984); *Baldwin v. Alabama,* 472 U.S. 372, 389 (1985). Some states have opted to require the sentencer to find and weigh certain aggravating factors as a means of minimizing the arbitrary imposition of the death penalty. In order to fulfill this goal, however, such aggravating factors may not be "so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." *Espinosa v. Florida,* 505 U.S. ___, 120 L.Ed.2d 854, 855 (1992).

In *Godfrey v. Georgia,* 446 U.S. 420, 428 (1980), the Court explained that where a state relies on aggravating factors to make a defendant death-eligible, the factors must furnish the sentencer with "clear and objective standards" that provide "specific and detailed guidance." Under the Georgia scheme, the absence of such guidance in an aggravating factor used to determine death eligibility – as where the aggravating factor requires the sentencer to examine the circumstances of the crime to

determine if it was "outrageously or wantonly vile, horrible or inhuman" – would inject the precise risk of arbitrary and capricious action condemned in *Furman. Godfrey v. Georgia, supra,* 446 U.S. at 428-33.

In the years since *Godfrey,* the Court has never suggested that the approach used in *Godfrey* to evaluate the propriety of aggravating factors is somehow limited to schemes which, like Georgia, limit the use of aggravating factors to determining whether a defendant is eligible for the death penalty. To the contrary, the Court has time and time again applied *Godfrey* to gauge the propriety of a challenged aggravating factor even where the factor actually played *no* role in determining if the defendant was death-eligible, but was solely used in the weighing process leading to death. The Court's analysis has always been grounded on the fact that, if a state requires the sentencer to weigh aggravating and mitigating factors in determining if a defendant should live or die, it may not place vague aggravating factors on death's side of the scale.

For example, in *Maynard v. Cartwright,* 486 U.S. 356 (1988), Justice White, writing for a unanimous Court, addressed the propriety of an aggravating factor under the Oklahoma capital sentencing scheme. Under the Oklahoma scheme, all persons convicted of murder are eligible for the death penalty. However, a defendant cannot be sentenced to death unless the jury finds at least one aggravating factor at a separate penalty phase. At that point, the jury is required to weigh the aggravating and mitigating factors and decide whether to sentence the defendant to death.

In *Maynard*, defendant was convicted of murder and the jury found two aggravating factors. Before this Court, defendant argued that one of those factors – the "especially heinous, atrocious or cruel" factor – was vague under *Godfrey*. Of course, because the defendant in *Maynard* was plainly death-eligible under Oklahoma law by virtue of an *unchallenged* aggravating factor, the only role served by the *challenged* aggravating factor was as a weight on death's side of the scale in the actual weighing process. Nevertheless, in *Maynard*, the Court applied the *Godfrey* test to hold that the challenged aggravating factor used in the weighing process was unconstitutionally vague. 486 U.S. at 363-364.

The Court has taken this identical approach on a number of occasions, repeatedly applying *Godfrey* to assess the constitutionality of factors which, in the context of the cases before the Court, had no role in rendering the defendant death-eligible but were relevant only to the weighing process mandated under state law. *Arave v. Creech*, 507 U.S. ___, 123 L.Ed.2d 188 (1993) (*Godfrey* applied to assess constitutionality of aggravating factor where unchallenged aggravators remained to make defendant death-eligible); *Espinosa v. Florida*, 505 U.S. ___, 120 L.Ed.2d 854 (1992) (same); *Walton v. Arizona*, 497 U.S. 639 (1990) (same). In all these cases, the defendants were death-eligible by virtue of unchallenged aggravating factors. Thus, for purposes of appeal under the state schemes at issue, the only role of the challenged aggravating factor was in the weighing process that resulted in a death sentence. Nevertheless, the *Godfrey* test was applied in all cases.

State courts throughout the country have reached this same result, uniformly recognizing that *Godfrey* applies to aggravating factors used in the penalty determination even where the defendant has been properly found death-eligible at the guilt phase. *See, e.g., Wilson v. State*, 751 S.W.2d 734, 737-39 (Ark. 1988); *State v. Breton*, 562 A.2d 1060, 1063-66 (Conn. 1989); *Haney v. State*, 603 So.2d 368, 387 (Ala. 1991); *State v. Ramseur*, 524 A.2d 188, 224-25 (N.J. 1987).

The longstanding rule applied in *Maynard, Creech, Espinosa* and *Walton*, as well as in state courts throughout the country, was the basis for analysis of the Mississippi statute by the Court in *Stringer v. Black*, 503 U.S. ___, 117 L.Ed.2d 367 (1992). There, the Court addressed an aggravating factor weighed by the jury under the Mississippi scheme.

Under Mississippi law, a defendant is not eligible for the death penalty unless found guilty of capital murder, a category narrower than the general category of murder. In fact, capital murder is limited to seven specific crimes. Miss. Code Ann. § 99-3-19(2).[6] In light of these statutes, and prior to *Stringer*, the Mississippi Supreme Court had made clear in no uncertain terms that, under state law, the "constitutionally required narrowing of the class of persons eligible for the death penalty is accomplished by

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[6] The crimes which can carry the death penalty in Mississippi are limited to murder (1) of a police officer, (2) by a person under sentence of life imprisonment, (3) by the use of a bomb or explosive device, (4) for hire, (5) in the course of several enumerated felonies, (6) during the felonious abuse of a child and (7) of an elected official.

the legislative definition of capital offenses in the guilt phase. . . . " *Ladner v. State*, 584 So.2d 743, 763 (Miss. 1991).

After this narrowing has taken place and a defendant has been convicted of capital murder, the statute provides that the defendant receives a separate sentencing hearing at which the jury determines whether any of eight statutory aggravating factors exist. Miss. Code Ann. § 99-19-101. If the jury finds one of these eight factors, it must then determine if there are any mitigating factors "which outweigh the aggravating circumstances found to exist." Miss. Code Ann. § 99-19-101(2)(c). "Based on these considerations [the jury is to determine] whether the defendant should be sentenced to life imprisonment or death." Miss. Code Ann. § 99-19-101(2)(d).

In *Stringer* itself the defendant was convicted of capital murder because the killing fit within one of the seven designated categories. At the separate sentencing hearing, the jury found three statutory aggravating factors. Before this Court, petitioner argued that because *one* of these aggravating factors – authorizing a death sentence if the murder was "especially heinous, atrocious or cruel" – was unconstitutionally vague, his death sentence was infected with constitutional error. Stringer argued that *Godfrey* and *Maynard* applied to Mississippi's aggravating factors.

In contrast, the State of Mississippi contended that because the narrowing function that made a defendant death-eligible in Mississippi was performed at the guilt phase, there was no impropriety in relying on a vague

factor which merely guided the jury's discretion at the sentencing phase:

> [I]t is obvious that the Mississippi scheme provides the constitutionally required narrowing during the guilt phase. The separate sentence determination process, in which aggravating factors are found, is not part of the constitutionally required narrowing function. . . . The fact that the weighing process occurs after the constitutionally required narrowing takes place decreases its importance in the determination of the sentence. In fact, it takes it out of the realm of a weighing statute.

Stringer v. Black, No. 90-6616, Brief of Respondent at 29.

This Court explicitly rejected that argument. The Court first noted that under Mississippi law, jurors were required to weigh aggravating and mitigating factors. *Stringer, supra*, 117 L.Ed.2d at 378. The Court explained that *Godfrey* and *Maynard* applied not only to those circumstances that made a defendant death-eligible, but they also applied to those aggravating factors which were used solely in the weighing process:

> [I]f a state uses aggravating factors in deciding who shall be eligible for the death penalty *or* who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion.
>
> * * *
>
> . . . Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed

> for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. *A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance.*

Stringer v. Black, supra, 117 L.Ed.2d at 381-82 (emphasis added).[7]

Consistent with this Court's practice in *Maynard, Creech, Espinosa* and *Walton,* as well as the general approach used by state courts throughout the country, *Stringer* held that the Mississippi statute was subject to

[7] Not only was this argument rejected in *Stringer,* it was also rejected in *Clemons v. Mississippi,* 494 U.S. 738 (1990). There, the Court was addressing Mississippi's "heinous, atrocious or cruel" aggravating factor. As it did in *Stringer,* the State of Mississippi argued that its aggravating factors were immune from Eighth Amendment scrutiny because the required narrowing process was performed at the guilt phase:

> "Even given Mississippi's broadened construction of the especially heinous aggravating circumstance, . . . the Mississippi capital murder statute still narrows the class of persons eligible for the death penalty. The definition of capital murder in Mississippi serves the . . . narrowing function. . . . "

Clemons v. Mississippi, No. 88-6873, Brief of Respondent at p. 57.

As Justice Blackmun's separate opinion in *Clemons* makes clear, the Court unanimously rejected this argument, holding that Mississippi's "heinous, atrocious or cruel" aggravating factor violated the Eighth Amendment. 494 U.S. at 756, n.1. *Accord Stringer v. Black, supra,* 117 L.Ed.2d at 381 (holding that "as a matter of federal law" it was "so evident" that *Godfrey* applied to Mississippi's aggravating factors that "the issue was not even mentioned in *Clemons.*").

the *Godfrey/Maynard* analysis. Where a state chooses to have aggravating factors play a formal role in the sentencing process, the factors must comply with *Godfrey* and *Maynard.*

The principle applied in *Stringer* is entirely consistent with the underlying thrust of the Court's capital jurisprudence. As Justice Kennedy noted for the Court in *Stringer,* the use of a vague aggravating factor in the weighing process is worse than the use of such a factor to determine death eligibility, for at the penalty selection stage, the vague factor creates the risk of an arbitrary death judgment predicated on an "illusory circumstance." In light of the Eighth Amendment's proscription against cruel and unusual "punishment," it would be anomalous indeed to hold that where a state requires a sentencer to weigh aggravating and mitigating factors in actually determining a defendant's punishment, the state is free to place unconstitutionally vague aggravating factors on death's side of the scale.

To the contrary, *Stringer* makes clear that the central feature of the Mississippi statute was that the "aggravating factors are critical in the jury's determination whether to impose the death penalty." *Stringer v. Black, supra,* 117 L.Ed.2d at 381. In this respect, as more fully discussed below, the scheme used at petitioner's trial was identical to that used in Mississippi.

B. The Instructions Given To The Jury in this Case Made Clear that Aggravating Factors Played a Critical Role in the Jury's Decision To Impose Death

Just as at a Mississippi trial, at petitioner's trial the instructions commanded the jury, in determining whether the defendant should live or die, to weigh the aggravating and mitigating circumstances on which it had been instructed. JA 62-63; RT 4:886-87.[8] As the verdict forms in petitioner's case make clear, the jury could not return a verdict without first determining the relative weight of the aggravating and mitigating circumstances. If the aggravating circumstances substantially outweighed the mitigating circumstances, the jury was to return a death sentence. JA 66; CT 225. If the aggravating circumstances did not substantially outweigh the mitigating circumstances, the jury was to return a sentence of life without the possibility of parole. JA 67; CT 226. The trial court's instructions and verdict forms made clear that the jury's

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[8] The operative and concluding words of the jury instructions were:

> In weighing the various circumstances, you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.
>
> To return a judgment of death, each of you must be persuaded that the aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

JA 63; RT 4:887.

decision was to be controlled by the weighing of aggravating and mitigating factors.[9]

Thus, the aggravating factors set forth in the instructions to petitioner's jury served the identical function as Mississippi's aggravating factors discussed in *Stringer*. Under both schemes, these factors played a critical role in guiding the sentencer's discretion in determining whether death was to be imposed. The aggravating factors at petitioner's trial – just as at a Mississippi trial – were "central in the weighing phase of a capital sentencing proceeding." *Stringer v. Black, supra*, 117 L.Ed.2d at 383.

Indeed, since 1983, this Court itself has repeatedly recognized the central role played by aggravating factors under the California scheme. For example, in *California v. Ramos*, 463 U.S. 992, 995 n.3, and 1008 n.22 (1983), in the course of upholding the constitutionality of accurate instructions explaining the Governor's commutation power, the Court noted that the California statute requires instructions on aggravating and mitigating circumstances and that the jury may impose death only if the "aggravating circumstances outweigh the mitigating circumstances."

Similarly, in *California v. Brown*, 479 U.S. 538, 540 (1987), in which the Court held that the Eighth Amendment did not preclude an instruction advising the jury not to be swayed by "mere sympathy," the Court noted

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[9] As noted above, the arguments of both counsel also focused the jury's attention on the central importance of this weighing process.

again that the California sentencer was to "consider aggravating and mitigating circumstances and to weigh them in determining the appropriate penalty."[10] Three years later, in holding that the Eighth Amendment did not preclude a state from requiring a sentencer to impose death if aggravating factors outweighed mitigating factors, the Court once again acknowledged that the California scheme required the sentencing jury, in reaching its decision, to weigh the aggravating circumstances against the mitigating circumstances. *Boyde v. California*, 494 U.S. 370, 374 and 377 (1990).

More recently, at least two members of the Court have again noted that the California scheme is one which "requires its juries to weigh aggravating and mitigating circumstances" in determining whether death is the appropriate punishment. *Pensinger v. California*, 502 U.S. ___, 116 L.Ed.2d 290 (1991) (O'Connor, J., joined by Kennedy, J., dissenting from a denial of certiorari). In light of the instructions and verdict forms given in this case – the latter telling the jury that it could impose death only if it found that "aggravating circumstances substantially outweigh the mitigating circumstances" – it seems clear that the scheme used at petitioner's trial was just like the scheme considered in *Stringer* and *Clemons*.

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[10] The dissenting opinion in *Brown* also noted that under the California statute, as construed by the state supreme court, " 'matters not within the statutory list are not entitled to any weight in the penalty determination.' *People v. Boyd*, 38 Cal.3d 762, 773, 700 P.2d 782, 790 (1985)." *Id.* at 560 (Brennan, J., dissenting). The exclusivity of the listed factors also reinforces the central role of the statutory aggravating circumstances.

The only identifiable difference between the Mississippi system and the scheme articulated in the instructions at petitioner's trial is that in Mississippi, unlike at petitioner's trial, the jury must make a threshold finding that at least one aggravating factor exists before it can impose the death sentence. That difference is simply irrelevant to the analysis under *Stringer*. As *Stringer* was careful to point out, the use of a vague aggravating factor is improper "in deciding who shall be eligible for the death penalty *or* who shall receive the death penalty. . . . " *Stringer v. Black, supra*, 117 L.Ed.2d at 381 (emphasis added).

Thus, the central feature of the Mississippi statute was its reliance on aggravating factors as "critical in the jury's determination whether to impose the death penalty." *Stringer v. Black, supra*, 117 L.Ed.2d at 382. As discussed above, the instructions, argument and verdict forms in this case demonstrate beyond any doubt that aggravating factors were critical to the jury's decision whether petitioner would live or die.

Indeed, the state supreme court has itself long recognized the critical role played by aggravating factors under the California capital sentencing scheme. *See, e.g., People v. Easley*, 34 Cal.3d 858, 883, 671 P.2d 813 (1983); *People v. Boyd, supra*, 38 Cal.3d at 773, 700 P.2d 782 (1985); *People v. Hovey*, 44 Cal.3d 543, 583, 749 P.2d 776 (1988); *People v. Kaurish*, 52 Cal.2d 648, 706, 802 P.2d 278 (1990). The state court has stated that the role of aggravating factors under the California scheme was "essentially equivalent" and "almost identical" to that of aggravating factors in the Florida capital sentencing scheme. *See, e.g., People v. Frierson*, 25 Cal.3d 142, 180, 599 P.2d 587 (1979); *People v. Brown*, 40 Cal.3d 512, 542-544, 709 P.2d 440

(1985), *rev'd.* on other grounds *sub nom, California v. Brown*, 479 U.S. 538 (1987). The standards established in *Godfrey* and its progeny must apply to the aggravating factors upon which the jury was instructed at petitioner's trial.

As noted above, on petitioner's direct appeal, the state supreme court assumed without deciding that these standards applied to the aggravating circumstances upon which petitioner's jury was instructed, but found that the challenged factors – factors (a), (b), and (i) – satisfied those standards. Until very recently, the state court had taken varying positions on the question of whether the Eighth Amendment vagueness standards of *Godfrey* and *Maynard* apply to California's aggravating factors.

In one case, the court recognized that the aggravating factors which a jury is instructed to weigh when determining whether a defendant should live or die, must meet those standards, citing *Walton v. Arizona, supra*, 497 U.S. at 653. *People v. Visciotti*, 2 Cal.4th 1, 74, 825 P.2d 388 (1992). In yet another case, the court concluded that these standards did not apply to California's aggravating factors at all, citing *Zant v. Stephens*, 462 U.S. 862, 878 (1983). *People v. Bacigalupo*, 1 Cal.4th 103, 148, 820 P.2d 559, *cert. granted, vacated* and *remanded*, 121 L.Ed.2d 5 (1992). In other cases, as in petitioner's case, the California court assumed, without deciding, that they applied, but held that the factors were not vague. *See People v. Noguera*, 4 Cal.4th 599, 649, 842 P.2d 1160 (1992); *People v. Sims*, 5 Cal.4th 405, 465-66, 853 P.2d 992 (1993); and *People v. Cudjo*, 6 Cal.4th 585, 637, ___ P.2d ___ (1993).

But in a case decided the day after certiorari was granted in petitioner's case, the state court, over a piercing dissent, has taken a definitive position that the vagueness standards of *Godfrey* and *Maynard* simply do not apply to California's aggravating factors. *People v. Bacigalupo*, 6 Cal.4th 457, ___ P.2d ___ (1993) (hereinafter sometimes "*Bacigalupo II*"). As the dissent pointedly notes, *Bacigalupo II* case is clearly wrong. *Id.* at 484-93 (Mosk, J., dissenting).[11]

The court's rationale in *Bacigalupo II* appears to be, first, that the vagueness standards of the Eighth Amendment, as elucidated in *Godfrey* and *Maynard*, apply only to criteria that render a defendant eligible for death, and do not apply to factors which the jury actually weighs in deciding whether the defendant should live or die. *Id.* at 475-476. This rationale is incorrect.

Indeed, it is plainly inconsistent with *Stringer*, which recognized that if a state "uses aggravating factors in deciding . . . who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion." *Stringer, supra*, 117 L.Ed.2d at 381.[12] It is also plainly inconsistent with numerous other

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[11] Concurring in the judgment, but dissenting from the majority's rationale, Justice Mosk wrote, "In sum, the majority and concurring justice cannot 'deconstruct' *Stringer* by denying either the existence of the Eighth Amendment's proscription against vague aggravating factors or its applicability to California death penalty law." *Id.* at 491.

[12] The California court assumed that the constitution's narrowing requirement is met by California's special circumstances and, therefore, there is no need for any further narrowing at the penalty selection phase. This assumption is itself open to

decisions of this Court which, as demonstrated above, have consistently applied Eighth Amendment vagueness

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serious question. As enacted by public initiative process in 1978, California's death penalty statute establishes 29 special circumstances that render a defendant eligible for the death penalty, and they encompass nearly every conceivable form of first-degree murder, including 11 types of felony-murder. *See* Cal. Pen. Code § 190.2; Appendix A. The explicit intent of the voters and proponents behind the statute was *not* to reduce the category of murderers eligible for the death penalty, but to expand or broaden it as much as possible.

Indeed, the information booklet distributed in 1978 to California voters, who enacted the present death penalty law, argued that the old death penalty law, which had been enacted by the Legislature a year earlier, should be replaced by the new version, known as Proposition 7, "[b]ecause the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would." *1978 Voters' Pamphlet*, p. 34, "Argument in Support of Proposition 7."

The legislative effort to continually expand the categories of homicide for which California defendants will be death-eligible continues unabated. On January 4, 1994, Assembly Bill 2443 was introduced. It proposed a brand-new special circumstance section for murder by "discharging a firearm from a motor vehicle." AB 2443 (Assemblyman Andal). January 5, 1994, saw Senator Leslie introduce Senate Bill 11 which would create a new special circumstance making all murders of persons under 14 years of age death-eligible. SB 11.

In that same week, on January 7, 1994, Assemblyman Goldsmith introduced legislation that would also create a new section of death-eligible murder for any adult who "intentionally killed the victim by discharging a firearm." AB 15. Three days later, January 10, 1994, Assemblyman Johnson introduced Assembly Bill 17 which would expand the felony murder subsection for arson. Finally, on January 18, 1994, Senators Ayala and Presley and Assemblyman Andal co-authored and introduced legislation that would add two more felonies to the felony murder section ("carjacking" and false imprisonment),

standards to challenged aggravating factors even where unchallenged aggravating factors remained to make the defendant death eligible. *See, Arave v. Creech, supra,* 507 U.S. ___, 123 L.Ed.2d 188; *Espinosa v. Florida,* 505 U.S. ___, 120 L.Ed.2d 854; *Walton v. Arizona, supra,* 497 U.S. 639; Argument IA, *supra,* at 13-14.

The California court's second rationale in *Bacigalupo II* rests on its inventive new interpretation of the function and purpose of the aggravating and mitigating factors listed in section 190.3. The court concluded that the purpose and function of the aggravating factors under the California scheme was different from the purpose and function of the aggravating factors in other states. In California, these factors merely "direct the sentencer's attention to specific, provable, and commonly understandable facts about the defendant and the capital crime that might bear on [the defendant's] moral culpability." *Bacigalupo II, supra,* 6 Cal.4th at 476, quoting *People v. Tuilaepa, supra,* 4 Cal.4th at 595.

That interpretation has no application to petitioner's case. As noted above, prior to *Bacigalupo II,* the state court had not only repeatedly recognized the critical role played by aggravating factors, but it had time and time again held that the sentencing process under California law was "essentially equivalent" to the weighing process

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another "drive-by" category of murder (discharging a firearm from a vehicle), and yet another new category of murder – "The murder was committed under circumstances wherein the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to any person other than the victim." SB 1311.

in other states like Florida. *People v. Frierson, supra,* 25 Cal.3d at 180; *People v. Brown, supra,* 40 Cal.3d at 542-43. Florida, like Mississippi, is a "weighing" state in which aggravating factors play a critical role in the sentencing choice; therefore, the Eighth Amendment is violated if the sentencer is allowed to weigh vague aggravating factors. *Stringer v. Black, supra,* 117 L.Ed.2d at 382.[13]

Petitioner's jury was instructed on the weighing process as it has long been interpreted prior to petitioner's trial, not as it was reinterpreted in December, 1993, 6 years after petitioner's trial. In petitioner's case, the list of aggravating and mitigating factors did more than merely direct the jury's attention to relevant facts. The jury instructions and verdict forms made clear to the jury that it was to make its penalty decision by weighing the aggravating factors it found to exist with the mitigating factors it found to exist, on the basis of the list on which it had been instructed.

In order to follow these instructions, the jurors necessarily had to examine the evidence in light of the list of factors and decide which aggravating factors existed and which mitigating factors existed. For example, the jury had to decide whether "the circumstances of the crime" or "the age of the defendant" constituted aggravating factors in this case. Only then could it make the required comparison between aggravating and mitigating factors. This process is indistinguishable from the process the

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[13] In *Stringer,* this Court found it significant that the Mississippi Supreme Court had stated clearly that its sentencing scheme operated in the same manner as Florida's. *Stringer v. Black, supra,* 117 L.Ed.2d.

jury engages in in states such as Florida and Mississippi.[14] As in those states, the standards articulated in *Godfrey* must apply to the aggravating circumstances petitioner's jury was authorized to weigh in deciding if he should die.

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[14] Thus, the sentencing process in petitioner's case is not at all comparable to the process in Georgia, in which the finding of an aggravating circumstance "does not play any role in guiding the sentencing body in the exercise of its discretion." *Zant v. Stephens, supra,* 462 U.S. at 874. Indeed, even if it were, the constitutionality of the California scheme would be questionable. In *Zant,* this Court upheld the Georgia capital punishment scheme despite the fact that it gave the jury complete discretion to select the penalty as long as one or more aggravating factors had been proven. In doing so, the Court relied on the two aspects of the Georgia scheme: the aggravating circumstances performed the required role of narrowing the category of persons who were eligible for the death sentence, and the Georgia Supreme Court reviewed every death sentence to ensure that it was not arbitrary, excessive or disproportionate. *Id.* at 875-79.

In contrast to these significant protections against arbitrary and capricious imposition of the death penalty in Georgia, the current California category of death-eligible offenses is extremely broad (*see* footnote 12, *supra*) and the California Supreme Court does *not* perform proportionality review. *People v. Andrews,* 49 Cal.3d 200, 234, 776 P.2d 285 (1989); *People v. Webb,* 6 Cal.4th 494, 536, ___ P.2d ___ (1993). Absent a constitutional role for the factors set forth in section 190.3, the California scheme contains *neither* of the safeguards which this Court deemed critical in upholding the Georgia statute.

II. The Application of Aggravating Factors (a), (b) and (i) in Petitioner's Case Violated the Eighth Amendment's Prohibition against the Arbitrary and Capricious Imposition of Capital Punishment

As previously discussed, petitioner's jury was instructed in accordance with California Penal Code section 190.3 that, in determining whether to impose a death sentence, it must weigh the aggravating and mitigating factors listed in the statute.

As more fully discussed below, as applied to petitioner's case, factors (a), (b) and (i) are unconstitutionally vague under the Eighth Amendment.

A. Factor (a), by Which the Jury Was Directed to Separately Weigh the "Circumstances of the Crime" as a Factor in Determining Whether Petitioner Should Live or Die, Violated the Eighth Amendment Because it Increased the Risk of Arbitrary and Capricious Application of the Death Penalty

In order to minimize the risk of arbitrary and capricious application of the death penalty, a state's aggravating factors must furnish the sentencer with "clear and objective standards" that provide "specific and detailed guidance." *Lewis v. Jeffers, supra,* 497 U.S. at 774 (1990); *Godfrey v. Georgia, supra,* 446 U.S. at 428; *Gregg v. Georgia, supra,* 428 U.S. at 198; *Proffitt v. Florida,* 428 U.S. 242, 258 (1976).

Thus, an aggravating factor that instructs the sentencer to look at the circumstances of the crime to see

whether it was "heinous, atrocious and cruel" is unconstitutional. *Shell v. Mississippi,* 498 U.S. 1, (1990); *Clemons v. Mississippi, supra,* 494 U.S. 738; *Maynard v. Cartwright, supra,* 486 U.S. 356. Similarly, an aggravating circumstance that instructs the sentencer to look at the circumstances of the crime to see if it was "outrageously or wantonly vile, horrible or inhuman" is unconstitutional. *Godfrey v. Georgia, supra,* 446 U.S. at 428-33.

It follows from these cases that an aggravating factor that merely instructs the sentencer to look at the circumstances of the crime, without even attempting any definition, limitation or guidance, is even more vague. Indeed, in several cases this Court has held that a sentencer may not simply look at the circumstances surrounding a crime and determine that a death penalty is appropriate. *See, e.g., Maynard v. Cartwright, supra,* 486 U.S. at 363; *Godfrey v. Georgia, supra,* 446 U.S. at 429-33; *Furman v. Georgia, supra,* 408 U.S. 238. As *Maynard* stated, this Court has "plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." 486 U.S. at 363.

In petitioner's case, the jury had no guidance whatsoever in making the critical decision whether the "circumstances of the crime" should be weighed as an aggravating factor in this case. As the Tenth Circuit has stated in a similar context:

> We agree that all of the circumstances surrounding a murder must be examined to determine whether the murder was 'especially heinous, atrocious, or cruel,' but there must be some

> objective standard that specifies which circumstances support such a determination. Consideration of all the circumstances is permissible; reliance upon all of the circumstances is not. . . . The discretion of a sentencer who can rely upon all of the circumstances of a murder is as complete and as unbridled as the discretion afforded the jury in *Furman*.

Cartwright v. Maynard, 822 F.2d 1477, 1491 (10th Cir. 1987), *aff'd.*, 486 U.S. 356.

Similarly, in petitioner's case it would have been permissible for the jury to consider the circumstances of the crime in evaluating the existence of other, properly defined aggravating factors. What was impermissible was for the circumstances of the crime "without some narrowing principle to apply to those facts," in and of themselves, to serve as an aggravating factor the jury was authorized to weigh in the process that led to death.

To be sure, it is quite true that even if the bare language of an aggravating factor fails to provide constitutionally adequate guidance, the state may provide a constitutionally adequate limiting construction of the factor. *Arave v. Creech*, *supra*, 507 U.S. ___, 123 L.Ed.2d 188, 189. The California Supreme Court, however, has not provided a "limiting instruction" for the "circumstances of the crime" aggravating factor. Indeed, it has expressly kept open the reach of this aggravating factor, stating that it has not yet "explore[d] the outer reaches of evidence admissible as a circumstance of the crime." *People v. Edwards*, 54 Cal.3d 787, 835, 819 P.2d 436 (1991).

Absent a limiting construction, the use of a factor as unbounded as the "circumstances of the crime" is precisely what *Maynard* forbids. In the final analysis, if a sentencer may not weigh on death's side of the scale an unguided finding that a crime was "heinous, atrocious and cruel" or "outrageously or wantonly vile, horrible or inhuman," neither may it find – with no guiding principle whatsoever – that the "circumstances of the crime" constitute an aggravating factor to be put on death's side of the scale. This portion of the instructions violated the Eighth Amendment.

Further, the lack of a guiding instruction in petitioner's case created the unacceptable risk that the jury would find an aggravating factor on the basis of improper considerations of race and ethnic origin. Petitioner is Samoan; the murder victim was "white." RT 3:549-50. Without any limiting instruction, these racial facts are plainly circumstances of the crime, to which the jury was free to attach the "aggravating factor" label. Certainly there is not one safeguard whatsoever in the category "circumstances of the crime" that would have prevented, or minimized the risk of, such an arbitrary and capricious factor in the penalty determination. "Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate, but remain undetected." *Turner v. Murray*, 476 U.S. 28, 35 (1986).

B. Factor (b), Which Allowed the Jury at Petitioner's Trial to Weigh as an Aggravating Factor the "Presence or Absence of Criminal Activity by the Defendant which Involved the Use or Attempted Use of Force or Violence," Violated the Eighth Amendment Because, Absent Instructions Defining Elements of the Prior Crimes, It Allowed Arbitrary and Capricious Sentencing

In addition to the instruction on "the circumstances of the crime" under factor (a), the penalty jury at petitioner's trial was also authorized to consider as aggravation under factor (b) "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." JA 61; RT 4:885. Without instructions on the elements of the purportedly relevant crimes, and clear definitions of "force" and "violence," the jury had no principled way to determine whether petitioner's alleged conduct was "criminal" or whether it involved "force" or "violence." Opinions on whether particular conduct is violent or criminal, and thus whether this factor is established, will vary from juror to juror, and, indeed, from jury to jury, resulting in a risk of arbitrary sentencing. The Eighth Amendment requires death penalty statutes to provide objective, specific guidelines when aggravating factors are used to control the sentencer's discretion. *Maynard v. Cartwright, supra,* 486 U.S. 356; *Godfrey v. Georgia, supra,* 446 U.S. 420. Where a capital punishment scheme uses aggravating factors which create a risk of arbitrary and capricious sentencing, those factors are unconstitutionally vague. *Gregg v. Georgia,* 428 U.S. 153, 189 (1976); *Maynard v.*

Cartwright, supra, 486 U.S. at 362-65; *Godfrey v. Georgia, supra,* 446 U.S. at 428.

Pursuant to this principle, state courts have invalidated statutory aggravating factors based on the defendant's prior criminal activity where these factors failed to provide the jury with clear guidelines. The Georgia Supreme Court held unconstitutionally vague an aggravating circumstance allowing the death penalty where "murder [is] committed by a person who has a substantial history of serious assaultive convictions." Ga. Ann. Code § 27-2534.1(b)(1); *Arnold v. State,* 224 S.E.2d 386 (Ga. 1976). The court found that the aggravating circumstance was constitutionally defective because it was "highly subjective." Likewise in Louisiana, that state's supreme court found vague an aggravating factor which allowed the jury to impose death based upon a "significant" history of criminal conduct. *State v. David,* 468 So.2d 1126, 1129-30 (La. 1985).

Finally, and similarly, in *State v. White,* 395 A.2d 1082 (Del. 1978), the Delaware Supreme Court held unconstitutionally vague an aggravating circumstance in which the victim was defined as "elderly" or "defenseless." The court held that those terms did not "have a common and ordinary meaning sufficiently definite to meet their usage in the context of the statute." *Id.* at 1090.

At petitioner's trial, evidence was introduced under factor (b) allowing the jury to impose death, at least in part, on the basis of "criminal activity by the defendant which involved the use or attempted use of force or violence. . . . " JA 61; RT 4:885. The trial court did not instruct the jury on the elements of potentially relevant

crimes nor on a definition of violence.[15] Absent some form of guiding instructions, the jury could not have determined whether or not petitioner's conduct constituted a violation of any penal statute or was otherwise "criminal."

Acknowledging the vagueness potential in factor (b), the California Supreme Court in *People v. Boyd, supra*, 38 Cal.3d at 774, unanimously held that conduct which was not violent in nature and which did not violate a penal section was irrelevant under factor (b). Regarding the "violent" prong, the court said, "The purpose of the statutory exclusion is to prevent the jury from hearing evidence of conduct which, although criminal, is not the type which should influence a life or death decision." The court has accordingly limited factor (b) to activity involving or threatening violence against persons and not mere property. *Id.* at 776. Likewise, concerning the "criminal" aspect of factor (b), it was and is "limited to conduct *that*

---

[15] The only instruction petitioner's jury received regarding how to weigh this area of evidence was the following:

> Evidence has been introduced for the purpose of showing that defendant Tuilaepa has committed criminal acts which involved the express or implied use of force or violence or the threat of force or violence. Before you may consider any of such criminal acts as an aggravating circumstance in this case, you must first be satisfied beyond a reasonable doubt that the defendant did in fact commit such criminal acts. You may not consider any evidence of any other criminal acts as an aggravating circumstance.

JA 61-62; RT 4:886. *See* 1 California Jury Instructions, Criminal (CALJIC) 8.84.1.2 (5th Ed. 1983).

violates a penal statute." People v. Wright, 52 Cal.3d 367, 425, 802 P.2d 221 (1990) (emphasis in original).

Recognizing the prejudice if the factor is not so limited, the court observed that "[w]hen the prosecution is permitted to introduce such evidence the penalty trial can become a spectacle in which witnesses recount numerous trivial incidents of misconduct and ill temper." *People v. Boyd, supra*, 38 Cal.3d at 774. In the present case, however, the uninstructed jurors were free to impose the death penalty on the basis of any conduct that struck them as "criminal" and "violent."[16]

For these reasons, in petitioner's trial, factor (b) did not constitute the type of "objective standard" that properly channeled the sentencer's discretion. Factor (b) necessarily allowed each juror to impose the death penalty based on that juror's idiosyncratic assessment of what the factor permitted and what constituted criminal and/or violent conduct. And in petitioner's case a large portion of the factor (b) evidence was, as a matter of California

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[16] This case is an example of the type of "spectacle" which can result from the lack of a channeling instruction. The state supreme court itself found that several incidents did not involve "violent criminal" activity. JA 90-92; *People v. Tuilaepa, supra*, 4 Cal.4th 569, 589-91. The improperly admitted Youth Authority incidents were described by the court as being "outbursts," "angry retorts," "property damage," and, possession of unidentified "gang contraband." (Outside the jury's presence, the contraband was described as "lots of gang writings," and nothing more.) RT 4:670. Likewise, the court found irrelevant testimony that the outbursts occurred in "maximum security" CYA facilities. JA 92; *id.* at 591. *See also* RT 4:728-29.

law, neither criminal nor violent. Unfortunately, the jury did not know that.

This is the precise type of arbitrary and capricious sentencing that *Godfrey* and *Maynard*, as well as *Arnold* and *White* of sister states, all make clear is forbidden by the Eighth Amendment. Absent instructions defining the elements of the relevant criminal activity and the meanings of "force" and "violence," or other limiting instructions, reliance on factor (b) as a basis for imposing the death sentence was unconstitutional under the Eighth Amendment.

C. Factor (i), which Instructed the Jury To Weigh the "Age" of Petitioner in Deciding between Punishments of Life and Death, Was Vague, Overbroad and Illusory, thereby Violating the Eighth Amendment's Prohibition against Arbitrariness

Factor (i), which allowed the jury to weigh in aggravation the "age" of the defendant at the time of the crime, is the third impermissibly vague aggravating factor tainting the penalty determination and petitioner's judgment of death. This factor is so vague and overbroad that petitioner's jury surely had to guess its meaning.

The California Supreme Court has construed factor (i) as a potential aggravating circumstance of extraordinary breadth and flexibility. In one of the first cases to treat a challenge to the age factor, the court agreed with the defendant that "mere chronological age, a factor over which one can exercise no control, should not of itself be deemed to be an *aggravating* factor." *People v. Rodriguez*,

42 Cal.3d 730, 789, 726 P.2d 113 (1986) (emphasis in original).

The following year, in *People v. Ghent*, 43 Cal.3d 739, 775, 739 P.2d 1250 (1987), the court held that the prosecutor could rely on "age" to comment on the absence of a mitigation factor:

> The prosecutor's remarks here reasonably may be viewed as merely arguing the inapplicability of a mitigating factor, rather than seeking to penalize defendant by reason of his age. No good reason appears for depriving the prosecutor of the opportunity to argue that certain otherwise mitigating factors are not present in the case.[17]

Finally, and most importantly, the state supreme court has held that "age" may indeed be an aggravating factor and has defined its scope as follows:

> In our view, the word "age" in statutory sentencing factor (i) is used as a metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty. Accordingly, either counsel may argue any such age-related inference in every case.

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[17] Perhaps on the basis of *Rodriguez* and *Ghent*, this Court itself characterized California as one of 29 states "specifically designating the defendant's age as a mitigating factor in capital cases." *Sanford v. Kentucky*, 492 U.S. 361, 375-76 fn.5 (1989).

People v. Lucky, 45 Cal.3d 259, 302, 753 P.2d 1052 (1988); *People v. Tuilaepa, supra*, 4 Cal.4th at 595.[18] And recently, that court, relying on *Lucky*, has stated "[I]n a given case, the prosecution may argue age is an aggravating factor, and the defense may argue it is mitigating. It is up to the jury to decide. That is the nature of the adversarial process." *People v. Edwards, supra*, 54 Cal.3d at 844. If the jury in petitioner's case understood "age" to mean what the California Supreme Court said it meant in *Lucky*, then the jury had no guidance at all with which to apply the "age" factor.[19]

The state court's broad construction of factor (i) has not in any way minimized the risk of an arbitrary death judgment based upon "age" and has led to this becoming an all-purpose aggravating factor. Exemplifying how the factor has been manipulated to suit any case, we see that in *Tuilaepa*, the prosecutor argued that the 21-year-old petitioner was "old enough to know better" than to kill.[20] Another defendant was also "old enough to know better"

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[18] "Metonym" is defined by Funk & Wagnalls *Standard Dictionary* as "a word used as a substitute for another." "Metonym" is defined as "a figure of speech that consists in the naming of a thing by one of its attributes, as 'the crown prefers' for 'the king prefers.' " The question for petitioner's jury was not what it preferred, but what it understood.

[19] The jury was not instructed as to the limitation suggested by *People v. Rodriguez, supra*, 42 Cal.3d at 789, i.e., that factor (i) did not authorize aggravation on the basis of "mere chronological age."

[20] Contrasted with the prosecutor's approach in petitioner's case, in the companion case herein, the trial prosecutor stipulated that the age of that petitioner (20 years old) was a mitigating factor. *Proctor v. California*, 93-5161; RT 1479 (*Proctor*).

at 26 years of age. *People v. Sandoval*, 4 Cal. 4th 155, 189, 841 P.2d 862 (1992). The 30-year-old defendant in *People v. Caro*, 46 Cal.3d 1035, 1062 fn.13, 761 P.2d 680 (1988), was "old enough to know better." The 31-, 34- and 56-year-old defendants were described to their juries as being "old enough to know better" than to kill or do the harm for which they were convicted. *People v. Babbitt*, 45 Cal.3d 660, 716, 755 P.2d 253 (1988) (31-year-old); *People v. Brown*, 46 Cal.3d 432, 456, 758 P.2d 1135 (1988) (34-year-old); and *People v. Douglas*, 50 Cal.3d 468, 538, 788 P.2d 640 (1990) (56-year-old).

Indeed, the 19-year-old defendant in *People v. Belmontes*, 45 Cal.3d 744, 805-06, 755 P.2d 310 (1988), also was "old enough that he has to take responsibility for his own actions . . . ," and, finally, a 19-year-old had "30 or 40 [years] in terms of his experience on the side of criminal activity. . . . And his prior juvenile record stands for that proposition." *People v. Burton*, 48 Cal.3d 843, 865 n.8, 771 P.2d 1270 (1989). In practice, prosecutors are able to argue arbitrarily which murderers are "old enough to know better," demonstrating the illusory nature of this factor.

Given that practice, factor (i) is an aggravating circumstance in almost any murder case against almost any defendant. Such an application places factor (i) in direct violation of the Eighth Amendment's principles in that the factor on its face, without limiting or channeling direction to the jury, fails to differentiate among defendants. "If the sentencer could fairly conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm." *Arave v. Creech, supra*, 507 U.S. ___, 123 L.Ed.2d at 200.



CONCLUSION

As applied in petitioner's case, California Penal Code § 190.3 is vague and imprecise and, therefore, arbitrary and capricious under the Eighth Amendment. Petitioner's death judgment is a result of a constitutionally invalid process and his case must be remanded for consideration consistent with the Eighth Amendment principles set forth by this Court in *Godfrey* and its progeny.

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APPENDIX

§ 190.2. [Penalty upon finding special circumstance]

(a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:

(1) The murder was intentional and carried out for financial gain.

(2) The defendant was previously convicted of murder in the first degree or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed murder in the first or second degree.

(3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree.

(4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden or concealed in any place, area, dwelling, building or structure, and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest or to perfect, or attempt to perfect an escape from lawful custody.

(6) The murder was committed by means of a destructive device, bomb, or explosvie that the defendant mailed or delivered, attempted to mail or deliver, or cause to be mailed or delivered and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(7) The victim was a peace officer as defined in Section 830.1, 830.2, 830.3, 830.31, 830.35, 830.36, 830.4, 830.5, 830.5a, 830.6, 830.10, 830.11 or 830.12, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a peace officer as defined in the performance of his duties; or the victim was a peace officer as defined in the above enumerated sections of the Penal Code, or a former peace officer under any of such sections, and was intentionally killed in retaliation for the performance of his official duties.

(8) The victim was a federal law enforcement officer or agent, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a federal law enforcement officer or agent, engaged in the performance of his duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his official duties.

(9) The victim was a fireman as defined in Section 245.1, who while engaged in the course of the performance of his duties was intentionally killed, and such defendant

knew or reasonably should have known that such victim was a fireman engaged in the performance of his duties.

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding, and the killing was not committed during the commission, or attempted commission or the crime to which he was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his testimony in any criminal proceeding.

(11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this state or any other state, or a federal prosecutor's office and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(12) The victim was a judge or former judge of any court of record in the local, state or federal system in the State of California or in any other state of the United States and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(13) The victim was an elected or appointed official or former official of the Federal Government, a local or State government of California, or of any local or state government of any other state in the United States and the killing was intentionally carried out in retaliation for or to prevent the performance of the victim's official duties.

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or

cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim while lying in wait.

(16) The victim was intentionally killed because of his race, color, religion, nationality or country of origin.

(17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:

(i) Robbery in violation of Section 211.

(ii) Kidnapping in violation of Sections 207 and 209.

(iii) Rape in violation of Section 261.

(iv) Sodomy in violation of Section 286.

(v) The performance of a lewd or lascivious act upon person of a child under the age of 14 in violation of Section 288.

(vi) Oral copulation in violation of Section 288a.

(vii) Burglary in the first or second degree in violation of Section 460.

(viii) Arson in violation of Section 447.

(ix) Train wrecking in violation of Section 219.

(18) The murder was intentional and involved the infliction of torture. For the purpose of this section torture

requires proofs of the infliction of extreme physical pain no matter how long its duration.

(19) The defendant intentionally killed the victim by the administration of poison.

(b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs (1), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), or (19) of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.

The penalty shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

§ 190.3. [Determination as to penalty of death or life imprisonment]

If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code or Sections 37, 128, 219, or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter

relevant to aggravation, mitigation and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in

rebuttal to evidence introduced by the defendant in mitigation.

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant was reasonably

believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, of the affects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in a state rison [sic] for a term of life without the possibility of parole.

Supreme Court, U.S.
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No. 93-5131
No. 93-5161

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1993

Paul Palalaua Tuilaepa (No. 93-5131), *Petitioner,*

v.

State of California, *Respondent.*

William Arnold Proctor (No. 93-5161), *Petitioner,*

v.

State of California, *Respondent.*

ON WRIT OF CERTIORARI TO THE
CALIFORNIA SUPREME COURT

RESPONDENT'S CONSOLIDATED BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. After death eligibility has been established by a unanimous jury verdict finding one or more valid special circumstances, are the sentencing factors listed in California Penal Code section 190.3, which assist and guide the jury in choosing between death or life imprisonment without possibility of parole, subject to the vagueness concerns of *Stringer v. Black*, 503 U.S. ___, 112 S.Ct. 1130 (1992)?

2. Once a defendant has been properly found to be eligible for the death penalty, may the jury at the penalty phase in California constitutionally consider sentencing factors which are not specifically labelled as either aggravating or mitigating?

3. Where the jury at the penalty phase has been specifically instructed to the contrary, does the prosecutor in a state capital case violate the Eighth Amendment by arguing that the absence of a mitigating factor can itself be an aggravating factor?

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STATEMENT OF THE CASE FOR PETITIONER PROCTOR

On the night of April 21, 1982, Petitioner, William Proctor, murdered 55-year-old Bonnie Stendal, a widow who taught first grade at the Burney Elementary School in Shasta County, California. Petitioner was 20 years old when he murdered Mrs. Stendal. Petitioner entered Mrs. Stendal's home in the evening and then beat, raped, tortured, and strangled her to death.

Petitioner tortured Mrs. Stendal by stabbing her repeatedly in her breasts. According to the pathologist, the curvature of some of these injuries indicated they had been inflicted slowly and deliberately. The torture occurred while Mrs. Stendal had been immobilized. Mrs. Stendal had also been severely beaten and raped more than once. Of the five injuries to her vagina, four had been made by a foreign object. Mrs. Stendal was murdered, first by nonfatal manual strangulation, later by ligature strangulation.

Petitioner then disposed of Mrs. Stendal's tightly bound body by dumping it over a cliff on a mountain road about 12 miles outside of Burney. Petitioner spent the day Mrs. Stendal's body was discovered buying concert tickets in Redding and drinking beer with a friend and two girls in a motel.

Petitioner was linked to the murder by a bloody palm print found on a magazine in Mrs. Stendal's bedroom. Petitioner's own lawyer, the public defender for Shasta County, described this palm print as "the most damning single piece of evidence I have ever seen." Proctor JA 51. The distinctive knots used to bind Mrs. Stendal were also linked to Petitioner as a result of a truck driving course he had taken.

After his arrest Petitioner told the police he had been at a friend's house on the evening of April 21. Petitioner lied to the police and told them he left his friend's house "at around 8:30, right after a baseball game came on," and that he "walked downtown" and "caught a ride home." He said he caught a ride with a guy in a Chevy pickup in front of a local market.

Petitioner also lied when he told the police he spent the remainder of the evening at home and went to bed at about 11 p.m. Petitioner told the police he got up at around 9 a.m. the next morning, and that he did not leave home until around 3:30 or 4 p.m. When the police asked Petitioner if he had gone to Mrs. Stendal's home the evening of April 21, he again lied and said he had *not* gone there.

After visiting her son in jail, Petitioner Proctor's mother told the police that Petitioner had asked her to lie and tell Detective Jarrett that he had spent the night of the murder at home. Mrs. Proctor told Petitioner

that she had already talked to Detective Jarrett and told him Petitioner had *not* spent the night at home. Petitioner then asked his mother if she would lie and tell Detective Jarrett that he had been at a party that night.

Petitioner was charged with murder, a violation of California Penal Code section 187, and with four special circumstances. One of these special circumstances alleged that the murder of Mrs. Stendal was "Especially heinous, atrocious, or cruel, manifesting exceptional depravity" (§ 190.2(a)(14)). Petitioner Proctor's motion to dismiss this special circumstance allegation was later granted.

On December 20, 1982, the jury returned a verdict convicting Petitioner of first degree murder, finding the three remaining special circumstances to each be true. Petitioner was also convicted of rape with great bodily injury and of first degree burglary with great bodily injury. A mistrial was declared when the jury was unable to reach a decision on penalty and after Petitioner sought a change of venue, the retrial of the penalty phase was moved to Sacramento County.

The prosecution called 13 witnesses, essentially the same witnesses used at the guilt trial. The defense briefly presented two witnesses, Petitioner's younger brother and his mother.

In his closing argument at the penalty trial, the prosecutor relied almost exclusively on the circumstances of Mrs. Stendal's murder to show that death was the appropriate punishment. The prosecutor spent the vast majority of his argument reviewing each of the charges, explaining the elements of each offense and of each special circumstance.

Although not required to do so under California law, the trial judge instructed the jury that they were required to use the "beyond a reasonable doubt" standard of proof before they could find any aggravating circumstance to be applicable to this case.

The prosecutor candidly acknowledged that in his view there were two mitigating circumstances in this case which included Petitioner's age [Pen. Code § 190.3(i)] and the lack of any prior violent criminal activity. Pen. Code § 190.3(b).

The prosecutor argued that the facts surrounding the torture murder special circumstance were the crux of his case that Petitioner should be sentenced to death.

The defense argued that the jury should not find the circumstances surrounding Mrs. Stendal's death to be an aggravating factor since the prosecution could not prove that she had not been killed before she was beaten, raped and tortured. Proctor JA 61-62. The defense also minimized Petitioner Proctor's three prior

felony convictions as youthful indiscretions, one involving an auto theft and the others involving the theft of beer from a pizza parlor. Proctor JA 62.

The defense responded to the prosecutor's brief argument that the jury could consider the absence of mitigation to be aggravation as to factors (d), (e), and (f) by claiming that these factors did not apply to the facts of this case and therefore could not be considered to be aggravating circumstances.

Although not required to do so by California law, the trial court at Petitioner Proctor's request, instructed the jury that:

> If a factor is not found by you to be a mitigating factor, that in and of itself does not make that factor an aggravating factor. In order for a factor to be considered an aggravating factor, you must be satisfied beyond a reasonable doubt that the factor does exist, and it is only if you determine that the factor exists beyond a reasonable doubt that you may consider the factor an aggravating factor.

Proctor JA 80.

The trial court then instructed the jury to consider, take into account and be guided by the sentencing factors, if they were applicable to this case. The court further instructed the jury that:.

If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life, without possibility of parole.

Proctor JA 79.

Although not required to do so, the trial court clarified the "shall" instruction by giving the following additional instruction at Petitioner's request:

In considering, taking into account, and being guided by the aggravating and mitigating circumstances, you may not decide the effect of such circumstances by the simple process of counting the number of circumstances on each side. The particular weight of such opposing circumstances is not determined by the relative number, but rather by their relative convincing force on the ultimate question of punishment.

The penalty phase jury returned a verdict finding that the aggravating circumstances outweighed the mitigating ones, and that death was the appropriate punishment.

On June 28, 1983, the Sacramento County Superior Court heard, considered, and denied

Petitioner's automatic motion for modification of judgment. Pen. Code § 190.4(e). Petitioner's appeal to the California Supreme Court followed automatically. The court issued its opinion affirming the conviction and penalty on December 28, 1992. Proctor JA 95-184.

STATEMENT OF THE CASE FOR PETITIONER TUILAEPA

On October 6, 1986, Petitioner, Paul Tuilaepa, and an accomplice entered a bar in Long Beach, California. Petitioner pointed a .22-caliber rifle in the face of the bartender and screamed that he wanted money. The bartender turned over his cash to petitioner. Then, Petitioner Tuilaepa and his accomplice split up and began robbing patrons at the bar.

Petitioner Tuilaepa took one customer's money from the bar counter. He pushed another customer against a vending machine and took a wallet containing cash. He shoved a third customer, taking from him a wallet and credit cards.

Meanwhile, petitioner's accomplice took money from at least three other patrons. But, when he pushed Melvin Whiddon and demanded his wallet, Melvin Whiddon struck the accomplice and knocked him down. At that point, Petitioner Tuilaepa intervened. He walked toward the scuffle, holding his rifle waist high,

and shot Melvin Whiddon in the neck at close range. The rifle bullet pierced Melvin Whiddon's lung and an artery.

Petitioner Tuilaepa swung the rifle in the direction of Kelvin Whiddon, Melvin Whiddon's brother. Kelvin Whiddon, unarmed, made no move toward Petitioner but instead tried to shield himself behind a post. Petitioner Tuilaepa, standing six feet away, shot Kelvin Whiddon in the chest.

Petitioner then turned the rifle toward a woman in the bar. Her husband, Bruce Monroe, stood in front of her to protect her. Monroe held no weapon, and made no threats or menacing gestures. Petitioner Tuilaepa shot Monroe in the stomach. The bullet tore through his kidney, his liver, and an artery of his heart, and it lodged against his spine.

Petitioner Tuilaepa and his accomplice ran toward the rear door of the bar. Kenneth Boone was standing near the door, but he made no move to stop petitioner. Petitioner made it to the door, looked back at Boone, smiled at him, and then aimed his rifle and shot Boone in the neck. The bullet exited the side of Boone's head, and Boone fell to the floor bleeding.

Kelvin Whiddon died from the gunshot wounds inflicted on him by Petitioner Tuilaepa. Melvin Whiddon was hospitalized for ten days due to his injuries, while Kenneth Boone was hospitalized for three

days. Bruce Monroe underwent surgery. At the time of trial, the upper part of his legs were numb and he wore a colostomy bag because of his gunshot wound.

Petitioner Tuilaepa was charged with murder and one special circumstance for the killing of Kelvin Whiddon. In addition he was charged with two firearm assaults, six robberies, and one attempted robbery for his attacks on the other patrons of the bar. In August 1987, Petitioner Tuilaepa was convicted of first degree murder with a finding that the special circumstance was true. The jury also convicted on the other charged offenses.

In the penalty-phase of the trial, the prosecution offered eyewitness testimony of several crimes and misdeeds that Petitioner Tuilaepa had committed during periods of confinement, primarily with the California Youth Authority (CYA), during 1982-1987. The purpose of this evidence was to show "[t]he presence . . . of criminal activity by the defendant which involved the use of force or violence or the express or implied threat to use force or violence," a factor for the jury's consideration in determining petitioner's sentence. Calif. Pen. Code, § 190.3(b). Prior to the presentation of this testimony to the penalty-phase jury, Petitioner Tuilaepa's counsel objected that some of the incidents, as described in advance by the eyewitnesses in a preliminary hearing outside the jury's presence, did not involve criminal

threats, force, or violence. The trial court overruled Petitioner's objection.

The various eyewitnesses then testified: (1) that Petitioner Tuilaepa in 1982 had attacked another ward in a fistfight and then threatened more retaliation against him; (2) that, later in 1982, he had yelled threats to rape and to kill a female guard as she patrolled the area outside of his locked cell; (3) that, in 1984, he had violated CYA rules by possessing razor blades, some of them broken, and a set of batteries taped together in the kind of pack typically used as a weapon; (4) that, after being cited by a CYA counselor for destroying a pair of state-issue pants in 1984, he had made a face-to-face threat to burn the counselor's face; (5) that, from inside his locked cell on successive days in 1985, he had yelled sexual threats and threats to torture or kill a woman guard in the hallway outside; (6) that, at a CYA infirmary in 1986, he had kicked a handcuffed ward in the face without any provocation; and (7) that, at the time of his murder trial in this case, he had struck and taken money from another inmate in the courthouse lockup room.

In defense at the penalty-phase, Petitioner Tuilaepa's mother and sister testified about difficulties in the Tuilaepa family, about petitioner's assistance to his paralyzed brother, and about their own desires for petitioner's life to be spared. In addition, a psychologist

testified that petitioner placed in the bottom five percent of the population in verbal ability, owing to the fact that he was raised by a family that communicated primarily in Samoan, but that he scored in the normal range, with normal intellectual potential, in non-verbal ability.

Each side was allowed one argument in the penalty phase. The prosecutor, who went first, expressly addressed arguments he said he anticipated from the defense about four kinds of mitigating evidence, Tuilaepa JA 10-11: Petitioner's age, Tuilaepa JA 11-14; Petitioner's sub-normal intelligence, Tuilaepa JA 10-11; the fact that victim Whiddon had precipitated the shooting by fighting with Petitioner's accomplice, Tuilaepa JA 15-16; and sympathy for Petitioner and his family, Tuilaepa JA 17-19. The prosecutor then offered his explanations why such mitigating evidence was not persuasive on the question of penalty. On the issue of age, the prosecutor argued that, in light of his criminal history, Petitioner had developed a level of criminal sophistication rendering him older than his years and that the methodical nature of the crime showed it was not a "mere folly of youth." Tuilaepa JA 12-13. "Age," the prosecutor said, "is not an excuse": Petitioner was "old enough to be held accountable" and was a "fit subject to face the death penalty." Tuilaepa JA 13-14. Similarly, the prosecutor argued that, because Petitioner

had no organic brain damage and possessed sufficient intelligence to function in life and to understand right and wrong, "the fact of an apparent subnormal IQ carries very little weight in this analytic process." Tuilaepa JA 14-15. In advance response to the possible suggestion that the victim had provoked the attack, the prosecutor argued that Petitioner could have responded in many ways short of homicide and that, rather than blame the victim, the proper focus of the jury should be the Petitioner's conduct. Tuilaepa JA 16-17. Last, on the question of mitigating evidence, the prosecutor argued that, regardless of sympathy for Petitioner's family, Petitioner's own crime rendered him undeserving of sympathy. Tuilaepa JA 17-19.

The prosecutor next discussed, explicitly, "the evidence that was presented in aggravation." Tuilaepa JA 19. He said it fell into two categories: the circumstances of the crime, and Petitioner's prior criminal behavior. Tuilaepa JA 19. The prosecutor argued that the circumstances of the crime themselves sufficed to justify the death penalty, and he specifically cited the number of people whom petitioner shot, the nature of their wounds, and the fact that the location of the wounds Petitioner inflicted even on the surviving victims had created a high risk of death that was avoided merely by good luck. Tuilaepa JA 25-26. On the issue of Petitioner's prior criminal behavior, the

prosecutor reminded the jury about Petitioner's assaults, the robbery, his possession of weapons, and his threats of violence. Tuilaepa JA 19-24.

Defense counsel discussed the five sentencing factors about which the jurors would be instructed, stating, "Believe me, you've just got an enormous amount of discretion." Tuilaepa JA 43-44. In discussing the "first" factor, the murder itself, defense counsel argued that it was "highly important" that Petitioner had not planned or premeditated or carefully considered killing anybody, but that Petitioner instead had fired all the shots within a few seconds after the unforseen conduct of victim Whiddon in attacking the accomplice. Tuilaepa JA 45-49. On the "next factor," the prior criminal conduct, defense counsel argued that Petitioner's conduct was "pretty insignificant." Tuilaepa JA 49-50. He then pointed out that, on the "third item," Petitioner had no prior felony convictions. Tuilaepa JA 51.

On the question of age, defense counsel pointed out that Petitioner was only about fifteen years old when he uttered some of his threats to the female counselors, and he contradicted the prosecutor's argument about Petitioner being "old enough" by asserting, "The law is age, period, not whether you're old enough, but age. [¶] He's a young man and you should consider that." Tuilaepa JA 52.

The trial court did not list all of the statutory sentencing factors from Penal Code section 190.3 in its instructions. Rather, the jury was instructed in part as follows:

> In determining which penalty is to be imposed on the defendant, you shall consider all the evidence that has been received during any part of the trial in this case. [¶] You shall consider, take into account and be guided by the following factors, if applicable: [¶] A, the circumstances of the crime in which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true. [¶] B, the presence or absence of criminal activity by the defendant which involved the use of force or violence or the express or implied threat to use force or violence. [¶] C, the presence or absence of any prior felony conviction. [¶] D, the age of the defendant at the time of the crime. [¶] E, any other circumstance which extenuates the gravity it *[sic]* of the crime even though it is not a legal excuse for the crime. [¶] And any other simpathetic *[sic]* or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death whether or not related to the offense for which he is on trial.

Tuilaepa JA 60-61.

The jury was also instructed as follows with respect to its consideration of Petitioner's prior misconduct in custody:

> Evidence has been introduced for for *[sic]* the purpose of showing that the defendant Tuilaepa has committed criminal acts which involve the express or implied use of force or violence or the threat of force or violence. [¶] Before you may consider any such criminal acts as an aggravating circumstance in this case, you must first be satisfied beyond a reasonable doubt that the defendant did in fact commit such criminal acts. [¶] You may not consider any evidence of any other criminal acts as an aggravating circumstance.

Tuilaepa JA 61-62.

The jury was instructed to consider, take into account, and be guided by the applicable aggravating and mitigating factors. They were further advised:

> In weighing of aggravating and mitigating circumstances does not mean *[sic]* a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of weights to any of them. [¶] You are free to assign whatever moral or simpathetic *[sic]* value you deem appropriate to each and all of the

various factors you are permitted to consider. [¶] In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. [¶] To return a judgment of death, each of you must be persuaded that the aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

Tuilaepa JA 62-63.

Petitioner Tuilaepa did not object to any of the penalty phase jury instructions.

The jury commenced deliberations at 11:35 a.m. on August 12. At 3:20 p.m. the next day, August 13, the jury sent a note reporting a deadlock after "eight and a half hours of deliberation." The court excused the jurors for the day, asking them to return to continue deliberations the next morning at 9 a.m. At 10:40 the next morning, August 14, the jury returned its verdict of death for Petitioner Tuilaepa.

Petitioner Tuilaepa's appeal to the California Supreme Court was automatic. That court affirmed the convictions and death judgment in an opinion issued on December 28, 1992.

ARGUMENT SUMMARY

Petitioners essentially ask this Court to declare California's death penalty procedures unconstitutional, with the possible reversal and retrial of more than 350 death judgments. In these cases now before this Court, it is argued that three of the sentencing factors used in California to assist juries during the penalty phase of a capital case in selecting between death and life imprisonment without parole are subject to the vagueness test which this Court applied to the Mississippi capital sentencing scheme in *Stringer v. Black*, 503 U.S. ___; 112 S.Ct. 1130 (1992).

Petitioners allege that the following three capital sentencing factors are unconstitutionally vague when used for aggravation rather than mitigation: (1) the circumstances of the offense [Pen. Code § 190.3(a)]; (2) prior criminal activity which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence [Pen. Code § 190.3(b)]; and (3) the defendant's age [Pen. Code § 190.3(j)]. Petitioners claim that when used for aggravation rather than mitigation, these factors are so vague as to be of no benefit whatsoever in narrowing the jury's discretion and that these factors do not meaningfully assist the jury in making an individualized and rational sentencing choice. When used for

mitigation, Petitioners apparently see no vagueness in these same factors.

Falling victim to the "tyranny of labels" there is an assertion that since California refers to its capital sentencing factors as "aggravating circumstances" and because California requires penalty phase juries to "weigh" these sentencing factors, this state's sentencing procedures are identical to those of Mississippi and other weighing states. Respondent will show that such is not the case.

Although different from those in Mississippi and the other weighing states, California's capital sentencing procedures still meet the two basic constitutional requirements articulated by this Court for any capital sentencing scheme.

Thus, with respect to capital cases, this Court has consistently told the states that the Eighth Amendment imposes only two constitutional limitations on their capital sentencing procedures. First, rational criteria must be used to narrow the group of defendants eligible for the death penalty. Second, defendants facing capital sentencing must be allowed to present any relevant mitigating evidence.

Once these limitations have been met, the states have been given the option of fashioning their own individual procedures.

California has enacted statutory special circumstances which narrow the group of defendants eligible for the death penalty and California allows defendants to present their mitigating evidence at the penalty trial. Petitioners do not challenge the special circumstance findings utilized in California to narrow the group of defendants eligible for the death penalty. Instead, it is claimed that this Court's decision in *Stringer* holds that the Eight Amendment requires a second round of narrowing, which allegedly must take place at the sentencing phase.

In the Mississippi death penalty procedures which were reviewed in this Court's decision in *Stringer*, the aggravating circumstances used at the sentencing phase simultaneously performed two entirely different functions. The first of these two-fold functions is that of narrowing the class of death-eligible defendants and the second is that of assisting the sentencer in determining whether death is appropriate for the particular defendant.

To the extent that Mississippi's aggravating circumstances are used in this dual capacity, they were found to be subject to the Eighth Amendment's vagueness test.

The California Supreme Court has recently rejected the claim that the concerns expressed in *Stringer* are applicable to California's death penalty statute.

Simply put, a sentencing factor which does not perform a narrowing function, but is instead used exclusively to assist the jury in the selection of the appropriate penalty for a particular defendant, is not subject to this Court's traditional Eighth Amendment vagueness analysis. Under these circumstances, a second round of narrowing is not constitutionally mandated.

In its decision following remand from this Court, the majority opinion of the California Supreme Court found that while the traditional Eighth Amendment vagueness test did not apply to California, the sentencing factors set forth in Penal Code section 190.3 must nevertheless meet standards of specificity and relevance. The majority held in *People v. Bacigalupo*, 6 Cal.4th 457 (1993) (*Bacigalupo II*) that California's eleven capital sentencing factors "must be defined in terms sufficiently clear and specific that jurors can understand their meaning, and they must direct the sentencer to evidence relevant to and appropriate for the penalty determination."

It is respondent's position that even these standards are not constitutionally mandated where a state capital sentencing statute satisfies the traditional two part test of first narrowing the class of those who are death eligible and second, allows the defendant to present mitigating evidence on whether death is the appropriate punishment. *See Bacigalupo II, supra*, 6

Cal.4th at 479-484, 24 Cal.Rptr.2d at 822 (Panelli, J., concurring).

Petitioners are actually asking this court to drastically depart from its existing Eighth Amendment precedents. They are requesting that an entire new requirement be added to those already articulated in the cases summarized by *McClesky v. Kemp*, 481 U.S. 279 (1987). A holding by this Court that narrowing is needed not only at the capital eligible stage but also at the sentencing stage would "alter in significant fashion this Court's capital sentencing jurisprudence." *Johnson v. Texas*, ___ U.S. ___, 113 S.Ct. 2658, 2671 (1993). Such an expansion of the Eighth Amendment would work a substantial injustice on those states which have justifiably relied on this Court's previous pronouncements as to the minimum requirements of the Eighth Amendment.

However, even if this Court were to review the three challenged sentencing factors for vagueness as Petitioners suggest, there is no basis for finding any of them constitutionally suspect since they each meet the dual requirements of relevance and specificity called for by the California Supreme Court. Nor have Petitioners shown that the Eighth Amendment requires that the factors set forth in Penal Code section 190.3 be individually labelled as either aggravating or mitigating.

For these reasons, Respondent asks this Court to deny Petitioners' request for relief.

ARGUMENT

I.

THE SENTENCING FACTORS USED IN CALIFORNIA TO ASSIST JURIES DURING THE PENALTY PHASE IN SELECTING THE APPROPRIATE PUNISHMENT IN A CAPITAL CASE ARE NOT SUBJECT TO THIS COURT'S EIGHTH AMENDMENT VAGUENESS ANALYSIS

Petitioners jointly argue that the vagueness test employed in *Stringer* and in this Court's earlier Eighth Amendment cases must be applied to at least three of the eleven sentencing factors[1/] used in California by

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1. Penal Code section 190.3 specifies that the factors which the jury shall take into account in selecting the appropriate penalty in a capital case are:

(a) The circumstances of the crime. . . .

(b) The presence or absence of criminal activity . . . which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant. . . .

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a morel justification or extenuation for his conduct.

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired

juries deciding the appropriate penalty in capital cases. Respondent disagrees as did the California Supreme Court when it recently considered and rejected the identical claim. *See People v. Bacigalupo*, 6 Cal.4th 457 (1993).

Specifically, Petitioners allege that the following three factors which juries may consider in deciding the appropriate punishment in a capital case are unconstitutionally vague when used as an aggravating rather than mitigating circumstance: (1) the circumstances of the offense [Pen. Code § 190.3(a)]; (2) prior criminal activity which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence [Pen. Code § 190.3(b)]; and (3) the Defendant's age [Pen. Code § 190.3(i)]. Petitioners claim that when used as an aggravating rather than mitigating circumstance, these factors are so vague as to be of no benefit whatsoever in narrowing the jury's discretion and that these factors do not assist the jury in making an individualized and rational sentencing choice. Petitioners claim this

as a result of mental disease or defect, or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

vagueness is so pernicious that it also prevents meaningful review by the trial court at the modification hearing and that it also prevents meaningful appellate review by the California Supreme Court. In short, Petitioners claim that any capital judgment in which aggravating evidence was used pursuant to any of these factors must automatically be reversed. However, Petitioners apparently find no constitutional vagueness problems when this same type evidence is used as a mitigating circumstance.

Petitioner Proctor challenges only factor (a) while Petitioner Tuilaepa challenges all three factors. In the case of Petitioner Proctor, the prosecutor acknowledged that age could be considered by the jury as a mitigating circumstance in selecting the appropriate punishment and no factor (b) evidence was introduced at the penalty phase retrial in petitioner Proctor's case.

In Petitioner Tuilaepa's case, the prosecutor merely argued against considering the defendant's age as a mitigating factor and did not affirmatively claim that age was an aggravating factor. The prosecutor in the Tuilaepa case did argue that there was evidence which established that both factors (a) and (b) were aggravating rather than mitigating circumstances.

Citing to this Court's opinion in *Stringer v. Black*, 503 U.S. ___, 117 L.Ed.2d 367 (1992), Petitioners claim these three sentencing factors, when used to show

aggravation, are deficient in that (1) the term "circumstances of the crime" under factor (a) is allegedly vague in regard to which facts of the case weigh in favor of death and that this factor provides no guidance to the jury in making its sentencing choice; (2) factor (b) is allegedly vague because the jury is not told which crimes qualify as aggravators and what the elements of these crimes are; and (3) factor (i) is supposedly vague because the jury is provided no guidance on how to determine how a defendant's chronological age mitigates or aggravates the charged offenses. In addition, Petitioner Proctor argues that factors (d), (e), and (f) are also vague because the prosecutor was allowed to argue that the absence of mitigating evidence permitted the jury to consider these as aggravating factors. Finally, Petitioner Proctor argues that factors (d), (e), (f), (g), (h), and (j) are vague because the jury is not told whether they are aggravating or mitigating, if present.

As will be shown, Petitioners' attempt to establish the vagueness of these sentencing factors under *Stringer v. Black* is misplaced, as the California capital punishment scheme fully comports with this Court's well-established death penalty jurisprudence.

The constitutional requirements which a state must satisfy before imposing a death sentence were

succinctly summarized by this Court in *McCleskey v. Kemp*, 481 U.S. 279, 305-306 (1987):

> In sum, our decisions since *Furman* [v. *Georgia* (1972) 408 U.S. 238] have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

Once these two constitutionally imposed limiting principles have been satisfied, "the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished." *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990).

While the Eighth Amendment clearly requires that the class of death-eligible defendants be narrowed,

this Court has consistently held that it is also the rule that there is no exclusive "right way for a State to set up its capital sentencing scheme." *Spaziano v. Florida*, 468 U.S. 447, 464 (1984). Thus, this Court has found that the narrowing function may take place at either the guilt of penalty phase of a capital case. *Lowenfield v. Phelps*, 484 U.S. 231, 244-245 (1988). In many states the jury's discretion is channeled through the use of aggravating circumstances (referred to as special circumstances in California), one or more of which must be found true before a defendant is eligible for the death penalty. The use of such aggravating or special circumstances is not, however, "an end in itself" (*Lowenfield, supra,* at p. 244), and "the Eighth Amendment does not require that these aggravating circumstances be further refined or weighed by a jury." *Blystone, supra,* at p. 298.

For those states which employ them as part of the constitutionally required narrowing function, aggravating circumstances must "furnish principled guidance for the choice between death and a lesser penalty. *Richmond v. Lewis*, 506 U.S. ___, 121 L.Ed.2d 411; 113 S.Ct. 528, 534 (1992). That is, the circumstance must "genuinely narrow the class of persons" eligible for death and must "reasonably justify" the death penalty" on the defendant as compared to other convicted murderers. *Zant v. Stephens*, 462 U.S.

862, 877 (1993). An aggravating circumstance which a "person of ordinary sensibility" could find applicable to any murder will not suffice. *Godfrey v. Georgia*, 446 U.S. 420, 428-429 (1980) [absent some judicial limitation, an outrageously or wantonly vile, horrible, and inhuman aggravating factor did not adequately limit the jury's discretion].)

Claims that a particular aggravating or special circumstance is vague "are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman [,supra]*." *Maynard v. Cartwright*, 486 U.S. 356, 361-362 (1988). This court in *Maynard* expressly distinguished its review of statutory narrowing factors from claims of vagueness based on lack of notice under the Due Process Clause. In the latter case, statutes are assessed on an "as-applied basis" and the due process challenge may be overcome where "reasonable persons would know that their conduct is at risk." *Id.*, at p. 361. Thus, one who challenges an aggravating or special circumstance on Eighth Amendment grounds does not so much allege that the average juror would fail to understand the terms used, as they complain that any understanding based on the generally accepted meaning

of those terms would provide no guidance in channeling the jury's discretion *during the critical narrowing process.*

This Court's well established Eighth Amendment jurisprudence also amply demonstrates that the primary constitutional concern is with the procedure by which the state imposes a death sentence rather than with the substantive factors considered by the sentencer once the defendant is found to be within the class of persons eligible for the death penalty. *California v. Ramos*, 463 U.S. 992, 999 (1983). After the jury's discretion has been adequately channeled by narrowing the class of death-eligible defendants, this Court has allowed the states to permit juries to consider "a myriad of factors to determine whether death is the appropriate punishment." *Id.*, at p. 1008. The jury may, at that point, "exercise unbridled discretion" in reaching its sentencing verdict. *Zant v. Stephens*, *supra*, 462 U.S. at p. 875.

With the above principles in mind, *Stringer* and its application, if any, to California's death penalty law will be examined.

In *Stringer*, this Court reviewed a Mississippi death judgment. As explained in the opinion, a Mississippi defendant who is convicted of a capital murder -- in that case a killing during a robbery or

burglary -- proceeds to a sentencing phase.[2] If the jury returns a finding at the sentencing phase that at least one of eight statutory aggravating circumstances is true, it must then determine whether there are any mitigating circumstances which outweigh the aggravation before it may impose a death sentence. 112 S.Ct. at p. 1134. Thus, as interpreted by the Mississippi Supreme Court, *see Stringer, supra* at 1138-1139, an aggravating factor in Mississippi simultaneous performs two entirely different functions. The first of these two distinct functions is that of narrowing the class of death-eligible defendants and the second is that of assisting the sentencer in determining whether death is appropriate for the particular defendant. Indeed, the jury's finding of an aggravating circumstance effectively requires the defendant to present evidence of mitigation sufficient to overcome the aggravation. *Cf. Walton v. Arizona*, 497 U.S. 639, 643-644 (1990); 110 S.Ct. 3047 [placing burden on defendant to present mitigation sufficient to overcome aggravation does not violate the Constitution].)

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2. Under Mississippi law a finding of "capital murder" is not designed to channel juror discretion, but is a necessary prerequisite to a sentencing hearing in the same way that a California jury must find first degree murder before the defendant is death-eligible. See Miss. Code, Ann. §§ 97-3-19; 97-3-21; see also *Cabana v. Bullock*, 474 U.S. 376, 385 (1986) [discussing "capital murder" under Mississippi law].

Stringer's jury found three aggravating circumstances. Although the Mississippi Supreme Court upheld all of them in affirming the judgment, subsequent United States Supreme Court decisions (see *Clemons v. Mississippi*, 494 U.S. 738 (1990) concluded that the "heinous, atrocious or cruel" circumstance was unconstitutionally vague. Given the significance the Mississippi court has attached to aggravating circumstances during the weighing phase of a capital sentencing hearing, this Court found that the use of "a vague or imprecise" factor "at the very least requires constitutional harmless-error analysis or reweighing in the state judicial system." 112 S.Ct. at p. 1140. The reviewing court in a "weighing state"[3/] may not simply assume that an invalid aggravating factor did not infect the weighing process. *Id.*, at p. 1137. Such analysis is particularly important under a statute like Mississippi's where the invalid aggravating factor first narrows the class and then effectively creates a presumption of death

3. While it is true that California requires juries to weigh aggravating and mitigating factors during the penalty phase, it is not clear that this process makes California a weighing state within the meaning of the this Court's Eighth Amendment cases. In *Stringer* the court focused on the fact that the sentencing authority must first find an aggravating circumstance, which narrows the death-eligible class, and then weigh against that finding any mitigation. See also *Richmond v. Lewis*, *supra*, 121 L.Ed.2d 411; 113 S.Ct. at p. 534 [characterizing Arizona as a weighing state]. This is entirely unlike California's procedure, as explained further below.

unless outweighed by any mitigating evidence. *Id.*, at p. 1139. This Court also observed in *Stringer* that "a vague aggravating factor used in the weighing process . . . creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." *Ibid.* When considered in its proper context, respondent submits that the concern expressed in *Stringer* has no applicability to California's death penalty statute. Simply put, a sentencing factor which does not perform a narrowing function, but is used exclusively to assist the jury in the selection of the appropriate penalty for a particular defendant, is not subject to this Court's traditional Eighth Amendment vagueness analysis.

This was the precise holding of the California Supreme Court when it recently decided *People v. Bacigalupo*, 6 Cal.4th 457 (1993), on remand from this Court's order in *Bacigalupo v. California*, 506 U.S. ___, 121 L.Ed.2d 5; 113 S.Ct. 32 (1992).

In *Bacigalupo II* the California Supreme Court interpreted its own state law as falling outside this Court's Eighth Amendment concerns expressed in *Stringer*. This Court has noted that a state Supreme Court's interpretation of the meaning of its state's death penalty law can alone be dispositive. *Stringer*, 117 L.Ed.2d at 381. The California Supreme Court has

concluded that this Court's Eighth Amendment vagueness concerns expressed in *Stringer* have no application to the sentencing factors set forth in California Penal Code section 190.3 since these factors are only considered by the sentencer after the defendant has been found beyond a reasonable doubt to have come within the legislatively defined category of persons eligible for the death penalty. *Bacigalupo II*, 6 Cal.4th at 474-478 (majority opinion), at 480 (concurring opinion of Justice Panelli) 24 Cal.Rptr.2 at 818-820; at 822.

Neither Petitioner attacks the "vagueness" of the special circumstances which made them eligible for the death penalty in California. Instead, they merely seek to apply the vagueness test to the sentencing factors of California Penal Code section 190.3 which assist the jury in determining who among those eligible for capital punishment should actually be put to death.

In *Stringer*, Mississippi sought to establish that its system could be equated with the scheme in Louisiana which had survived constitutional challenge in 1988. In Louisiana, however, the narrowing of the death-eligible class occurs with the finding of capital murder in the guilt phase, after which the jury must find at least one aggravating circumstance, but is not required to weigh aggravating versus mitigating factors in order to return a verdict of death. This Court upheld the Louisiana scheme, finding its use of aggravating circumstances was

not comparable to their use in other states, such as Florida, i.e., so called "weighing" states. *Lowenfield v. Phelps*, 484 U.S. 231, 244-245, 98 L.Ed.2d 568, 108 S.Ct. 546 (1988); compare *Socher v. Florida*, 504 U.S. ___, 119 L.Ed.2d 326; 112 S.Ct. 2114 (1992) and *Espinosa v. Florida*, 505 U.S. ___, 120 L.Ed.2d 854; 112 S.Ct. 2926 (1992).

It was argued by the state in *Stringer* that since Mississippi narrowed the death-eligible class in the guilt phase by requesting the jury to first convict the defendant of capital murder, the use of aggravating factors in Mississippi had no constitutional significance. The Mississippi Supreme Court had, however, stated in no uncertain terms that its "sentencing scheme operates in the same manner as the Florida system." *Stringer*, 117 L.Ed.2d at 381. The Mississippi statute was also interpreted by the United States Supreme Court in light of *Godfrey v. Georgia*, 446 U.S. 420, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980) and *Maynard v. Cartwright*, 486 U.S. 356, 361-362; 100 L.Ed.2d 372; 108 S.Ct. 1853 (1988), which dealt with the adequacy of state aggravating circumstances to channel the sentencer's discretion by narrowing the death-eligible class. *See also Shell v. Mississippi*, 498 U.S. ___, 112 L.Ed.2d 1; 111 S.Ct. 313 (1990) reversing because of inadequate aggravating factors, citing *Maynard* and *Godfrey*.

In contrast to the situation presented in *Stringer*, neither this Court, nor the California Supreme Court has held that the sentence selection part of California's death penalty scheme operates in precisely the same manner as another state wherein aggravating factors have been held to have constitutional significance.[4]

4. Petitioners and amicus curiae suggest that this Court's denial of certiorari in *Pensinger v. California*, ___ U.S. ___ 116 L.Ed.290; 112 S.Ct. 357 (1991) reh. den. 112 S.Ct.923 indicates that at least two justices of this Court have found that California and Mississippi are both weighing states. Petitioners' reliance on *Pensinger* is misplaced. In *Pensinger* the defendant had been convicted of two special circumstances, one of which was later found to be invalid. Justice O'Connor noted that in California at the penalty phase, the trier of fact weighs any aggravating circumstances, including the special circumstances found to be true, against any mitigating circumstances. The California Supreme Court had found the torture murder special circumstance to be invalid because of an instructional error dealing with the requisite intent. *See People v. Pensinger*, 52 Cal.3d 1210; 278 Cal.Rptr. 640 (1991). The California Supreme Court had rejected a harmless error claim as to the validity of this special circumstance but nevertheless affirmed the conviction, because there was still one other valid special circumstance in the case.

As the dissent from the denial or certiorari notes in *Pensinger* the penalty phase jury in California may consider "any special circumstances found to be true" as an aggravating factor under Penal Code section 190.3(a). The California Supreme Court emphasized, however, that it was the *facts* relating to torture, rather than the statutory label of "special circumstance," which was of significance to the jury in its penalty deliberations. 52 Cal.3d at 1271-1272, 278 Cal.Rptr. at 674. This is completely unlike the Mississippi statutory scheme where the aggravating factor itself is significant to the penalty determination. For these reasons Petitioners are mistaken in their attempt to rely on the denial of certiorari in *Pensinger v. California, supra,* to support this claim that California and Mississippi are, or have been held

Most recently, in *Bacigalupo II*, the California Supreme Court explained that the factors set forth in section 190.3 are only considered by the sentencer after the defendant has been found death eligible under other provisions of the California Penal Code which are not being constitutionally attacked. *Bacigalupo II*, 6 Cal.4th at 475-477, 24 Cal.Rptr.2 at 819-820.

In *Bacigalupo II*, the California Supreme Court did not stop at holding that *Stringer* does not apply to California's sentencing factors but instead went on to find that the Eighth Amendment nevertheless imposes a lesser standard on factors used exclusively to assist the jury in a capital case to decide upon the appropriate punishment. In this regard the California Supreme Court held that:

> Any meaningful assessment of the moral culpability of a defendant convicted of the crime of capital murder will invariably include some facts about the offense and the offender that will weigh in the sentencing decision in favor of the more severe penalty of death. The section 190.3 "aggravating" factors in California's capital scheme do no more than direct attention to such facts. Because they do not perform a "narrowing" function, they are not subject to the standard that

to be, "weighing" states for *Stringer* purposes.

the United States Supreme Court articulated in *Godfrey v. Georgia, supra*, 446 U.S. 420, and in *Maynard v. Cartwright, supra*, 486 U.S. 356.

We do not, however, suggest that the Eighth Amendment imposes no standards whatsoever on those sentencing factors in section 190.3 of our 1978 death penalty law that can serve to aggravate penalty. As we explained in *People v. Tuilaepa, supra*, 4 Cal.4th at p. 595, these factors must meet the dual standards of "specificity" and of "relevance." *They must be defined in terms sufficiently clear and specific that jurors can understand their meaning, and they must direct the sentencer to evidence relevant to and appropriate for the penalty determination.*[5/]

6 Cal.4th at 477, 24 Cal.Rptr.2d at 820 (emphasis added).

Contrary to Petitioners' assertion, the California Supreme Court's decision in *Bacigalupo II* is entirely

5. Respondent does not endorse the portion of the majority opinion of the California Supreme Court which holds that the so-called "dual standards" test is required by the Eighth Amendment. Instead, Respondent agrees with the concurring opinion by Justice Panelli which finds that such a standard is not constitutionally mandated where a state capital sentencing statute satisfies the traditional two part test of first narrowing the class of those who are death eligible and second, allows the defendant to present mitigating evidence on whether death is the appropriate punishment. *See Bacigalupo II, supra*, 6 Cal.4th at 479-484, 24 Cal.Rptr.2d at 821-825 (Panelli, J., concurring).

consistent with the previous decisions of that court and offered no new or shocking interpretation of California's death penalty statutes. In contrast to the capital sentencing schemes in other states, before a California defendant is eligible for death, there must be a conviction of first degree murder *and* at least one special circumstance must be found true beyond a reasonable doubt. Pen. Code, § 190.1. "A single valid special circumstance finding is sufficient to determine that defendant is eligible for the death penalty." *People v. Bittaker*, 48 Cal.3d 1046, 1102; 259 Cal.Rptr. 630, 662 (1989). This provision adequately "limits the death sentence to a small subclass of capital-eligible cases." *Pulley v. Harris*, 465 U.S. 37, 53 (1984).

At the penalty phase the jury takes into account any of eleven statutory factors, if relevant, as well as any non-statutory mitigating evidence presented by the defendant. Pen. Code, § 190.3. If the jury concludes that the aggravating factors outweigh the mitigating factors, it returns a sentence of death. If it finds that mitigation outweighs aggravation, it returns a sentence of life in prison without parole. Pen. Code, § 190.3. There is no presumption that death is appropriate at the sentencing phase in California, *People v. Andrews*, 49 Cal.3d 200, 230; 260 Cal.Rptr. 583, 603 (1989), and apart from the requirement that the state prove prior uncharged criminal activity beyond a reasonable doubt,

People v. Robertson, 33 Cal.3d 21, 53; 188 Cal.Rptr. 77, 96 (1982), neither side has any burden of proof with respect to aggravation,[6] mitigation, or the appropriateness of death. *People v. Frierson*, 25 Cal.3d 142, 180, 158 Cal.Rptr. 281, 303 (1979).

Unlike Mississippi's aggravating circumstances which alone authorize death unless a jury finds that any mitigation outweighs them, a special circumstance finding in California in and of itself creates no presumption that death is appropriate.[7] To be sure, under California's statute the sentencing jury must consider the circumstances of the present crime and any special circumstances found to be true under section 190.3, subdivision (a), but California special

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6. Although not required to do so, the trial judge in Petitioner Proctor's case allowed the jury to impose a greater burden on the prosecution by instructing the jury that before it could consider "any fact as an aggravating circumstance" it had to "find that that fact has been established by evidence beyond a reasonable doubt." Proctor JA 79. The jury was also specifically instructed that the reasonable doubt standard applied to the three special circumstance findings and that the penalty phase jury had to make a *de novo* finding of the truth of each special circumstance before "you may determine whether or not the crimes and circumstances thereof constitute an aggravating factor."

7. California's special circumstances are, of course, subject to Eighth Amendment vagueness analysis. *See, e.g., People v. Davenport*, 41 Cal.3d 247, 260-271, 221 Cal.Rptr. 794, 801-810 (1985) (torture special circumstance); *People v. Edelbacher*, 47 Cal.3d 983, 1025; 254 Cal.Rptr. 586, 611-612 (1989) (financial gain special circumstance).

circumstances do not supply the sole basis for (or even a presumption in favor of) justifying a death sentence. By contrast, the Mississippi aggravating circumstances, which narrow the jury's discretion for *Furman* purposes (*Furman v. Georgia*, 408 U.S. 238 (1972), are also the *only* aggravating factors the jury may consider in determining whether death is appropriate. *See* Miss. Code Ann., § 99-19-101(5).

In this regard, the California Supreme Court has held that it is the *facts* underlying the special circumstances, as opposed to the finding that they are true, which is of particular significance to the penalty jury under the California sentencing scheme. *See, e.g., People v. Silva*, 45 Cal.3d 604, 632-636; 247 Cal.Rptr. 573; 588-590 (1988) (jury not misled by consideration of three improper special circumstances). Thus, because they are but one part of the factors upon which a jury may base its death verdict, special circumstances have a substantially different role and perform a far different function under California's statutory scheme from those of Mississippi's aggravating circumstances which were at issue in *Stringer*.

Petitioners and their amicus, the California Appellate Project [CAP], fall victim to the "tyranny of labels," *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934), by assuming that because California refers to its capital sentencing criteria as "aggravating factors," they must be

the same as "aggravating circumstances" in other states. Similarly, they conclude that because California requires the jury to "weigh" the aggravating and mitigating factors, it must invoke the same process applicable in other states which describe their sentencing procedure in similar terms. As this Court has observed, there is no "right way for a State to set up its capital sentencing scheme." *Spaziano v. Florida, supra*, at 464. It is thus necessary to examine each statute in its own context to determine the role and constitutional implications of its various sentencing procedures.

The determination that death is the appropriate punishment "is a moral inquiry into the culpability of the defendants." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). It is simply not possible to translate the concerns relating to an unwarranted conviction or an inadequate narrowing of the death-eligible class into the process by which the jury determines the appropriate punishment for a death-eligible defendant. *See California v. Ramos*, *supra*, 463 U.S. at 1009. By focusing attention on aggravation that includes matters "not directly related to the crime," *Boyde v. California*, 494 U.S. 370, 378 (1990) (referring to § 190.3(b)), and identifying various mitigating considerations, the list of relevant sentencing factors set forth in California Penal Code section 190.3 provides guidance to the jury and lessens the chance of an

arbitrary application of the death penalty. *Pulley v. Harris, supra,* 465 U.S. at 53. Nothing more has previously been required by the Constitution.

Petitioners are actually asking this Court to drastically depart from its existing Eighth Amendment precedents. They are requesting that an entire new requirement be added to those already articulated in the cases summarized by *McClesky v. Kemp*. A holding by this Court that narrowing is needed not only at the capital eligible stage but also at the sentencing stage would "alter in significant fashion this Court's capital sentencing jurisprudence." *Johnson v. Texas*, ___ U.S. ___, 113 S.Ct. 2658, 2671 (1993). Such an expansion of the Eighth Amendment would not bode well for those states which have justifiably relied on this Court's previous pronouncements as to the minimum requirements of the Eighth Amendment.

Acknowledging the unique nature of capital punishment, and to minimize the risk of arbitrary or capricious decisions, Respondent does not contest the necessity mandated by this Court for a narrowing of the class of those who are eligible for the death penalty. The two cases presently before the Court raise the issue of whether the Eighth Amendment requires yet another level of narrowing.

The objective of the sentencing hearing in a capital case "is an individualized determination on the

basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens, supra*, 462 U.S. at 879. It would seem that the jury is in the best position to meet this objective if it is allowed to receive and consider all of the relevant evidence available on this question, not just the unrestricted mitigating evidence offered by the defendant. One of the time honored principles of our judicial system holds that the adversarial system provides the best opportunity for insuring that a jury receives all of the relevant evidence pertaining to a contested factual question.

In its amicus brief CAP sets forth numerous examples of the different ways in which California's statutory sentencing factors have been argued. This, according to amicus, demonstrates that the provisions of Penal Code section 190.3 are vague. Apart from this Court's refusal to base constitutional interpretation on a comparative analysis of state court cases, *see Arave v. Creech*, 507 U.S. ___, 113 S.Ct. 1534, 1543-1544 (1993), or the arguments presented by prosecutors in other cases, *see Boyde v. California, supra,* 494 U.S. at 386 n. 6, the examples set forth by CAP support Respondent's rather than Petitioners' argument. That the various factors in section 190.3 can be interpreted in a variety of ways simply demonstrates their use as sentencing considerations to be applied in light of the specific defendant and circumstances of each capital case. Far

from injecting randomness into the process the general criteria assure that the jury will focus on the evidence for and against death which will most accurately assist the jury in its determination of the appropriate penalty for *that case*.

It is clear that the Eighth Amendment concerns articulated by this Court in *Stringer* with respect to aggravating factors which both narrow and determine, if not presume, death are *not* present anywhere in the California scheme. This Court's concern regarding the state's use of a vague aggravating factor in the weighing process, 112 S.Ct. at 1139, simply emphasizes the point that where a jury's discretion has not been fully narrowed during the course of the trial because of an inadequate aggravating factor, the mandate of *Furman* is not satisfied by weighing any mitigation against the questionable aggravating factor during the penalty phase.

Further, any claim that the sentencing factors listed in Penal Code section 190.3 are subject to independent vagueness analysis was impliedly rejected in *Zant v. Stephens, supra*. In *Zant*, the Georgia Supreme Court held that "a substantial history of serious assaultive criminal convictions" (one of the three aggravating factors used to narrow the death-eligible class in Stephens' case) was unconstitutionally vague. That is, it did not provide an adequate basis for distinguishing those murderers for whom death, in

general, would be appropriate, from those for whom it would not.[8/] This Court later found, however, that the same evidence of prior criminal conduct was constitutionally admissible at the sentencing phase as a basis for imposing the death sentence, regardless of the labels attached by the jury to that conduct. 462 U.S. at pp. 887-891. Indeed, the Constitution does not prohibit consideration of the defendant's criminal record, even as non-statutory aggravation, *Barclay v. Florida*, 463 U.S. 939, 956 (1983), because it is the type of information specific to the individual defendant which will assist the jury in determining whether death is appropriate for that particular member of the narrowed class. Thus, *Zant* clearly stands for the proposition that a factor which may be defective for purposes of narrowing the class of death-eligible defendants may nevertheless be constitutionally considered by a jury at the penalty phase in deciding whether to impose death on a defendant otherwise determined to be eligible for that penalty.

In light of this Court's holding in *Zant*, California's sentencing factors in section 190.3 are not subject to an Eighth Amendment vagueness analysis. California's special circumstances adequately narrow the death-eligible class, while the statutory sentencing factors

8. That court also upheld Stephens' death penalty because the other two ruled aggravating factors adequately supported the sentence. 462 U.S. at 867-868.

merely provide guidance to the jury regarding the type of information it should consider in determining the appropriate penalty. To the extent that a vagueness challenge can be mounted, it is limited to due process concerns about lack of notice and must be considered in light of each specific case. *Maynard v. Cartwright, supra*, 486 U.S. at 361.

Moreover, this Court's prior decisions which have consistently accepted the validity of California's death penalty statutes cannot be easily ignored. For example, in *California v. Ramos*, *supra*, 463 U.S. 992, this Court observed that a special circumstance finding by the jury placed the defendant into a class of persons eligible for the death penalty. *Id.*, at 1008. Rejecting a claim that an instruction dealing with the governor's commutation power was improper, this Court then found that section 190.3 "ensures that the jury will have before it information regarding the individual characteristics of the defendant and his offense, including the nature and circumstances of the crime and the defendant's character, background, history, mental condition, and physical condition." *Id.*, at 1006.

This Court again examined California's death penalty laws in *Pulley v. Harris*, *supra*, 465 U.S. 37. After summarizing the 1977 statute -- which for purposes of this argument is identical to the 1978 scheme under which Petitioners were prosecuted -- the

court concluded that California's procedure "cannot be successfully challenged under *Furman*, and our subsequent cases." *Id.*, at 51-53. The Court noted that the special circumstances adequately limited the subclass of death-eligible defendants, while the provisions of section 190.3 guided the jury's discretion in its deliberations. *Id.*, at 53.[9]

In *California v. Brown*, *supra*, 479 U.S. 538, 540, fn *, this Court expressly noted its "approval of [California's] statutory scheme" in *Ramos* and *Harris*. Given California's justifiable reliance on those decisions, and the failure to demonstrate that they "were themselves a misinterpretation of some constitutional command," Petitioners' effort to effectively eviscerate this Court's prior approval of the state death penalty scheme should be rejected. *Johnson v. Texas*, *supra*, 113 S.Ct. at 2668.

In none of the cases did this Court suggest that it viewed California as a "weighing state." Yet it was that description of the Mississippi process which compelled the reversal in *Stringer*. 112 S.Ct. at 1137; *see also Clemons v. Mississippi*, *supra*, 494 U.S. at 745 (describing Mississippi as a weighing state.) This Court

9. Although California provides such guidance to the jury, it is under no constitutional duty to do so. *Zant v. Stephens*, *supra*, 462 U.S. at 875; *California v. Ramos*, *supra*, 463 U.S. at 1008 n. 22.

has described a "weighing state" as one in which the "death penalty may be imposed only where specified aggravating circumstances outweigh all mitigating circumstances." *Parker v. Dugger*, 498 U.S. 308 (1991). When the operation of section 190.3 as set forth above is contrasted with the procedures followed in the so-called weighing states previously identified by this Court, it is clear that California does not fit neatly into that category and that California's use of its sentencing factors differs markedly from any other state.

Although a Florida jury returns an advisory verdict, the "trial judge . . . has ultimate sentencing authority. . . ." *Parker v. Dugger*, *supra*, 498 U.S. at 310. The Florida judge must find in writing at least one statutory aggravating circumstance, then conclude that there are insufficient mitigating circumstances to outweigh the aggravation. Fla. Stat., § 921.141(3). This procedure qualifies Florida as a weighing state. *Id.*, at 738; *Socher v. Florida*, ___ U.S. ___, 112 S.Ct. 2114, 2119 (1992).

Arizona provides exclusively for judicial sentencing in capital cases. In order to impose death, the trial court must find in writing that one or more of the statutory aggravating factors is true and that there are no mitigating factors sufficiently substantial to call for leniency. The state bears the burden of proving aggravation, while the defendant has the burden with

respect to mitigation. Ariz. Rev. Stat. Ann., § 13-703; *Walton v. Arizona*, *supra*, 497 U.S. at 643-644. Arizona is a weighing state. *Richmond v. Lewis*, *supra*, ___ U.S. ___, 113 S.Ct. at 534.

Unlike each of the above statutory schemes, California allows the jury at the penalty phase to determine whether the evidence before it has shown a particular sentencing factor to be either mitigating or aggravating. The penalty phase jury is not asked to decide if a particular aggravating factor is present. Moreover, California does not require written findings by the sentencer, does not require an express finding or agreement on the aggravating or mitigating factors, and does not provide a specific standard for weighing the aggravating and mitigating factors. Rather than mandating a specific finding that at least one aggravating circumstance exists in order to justify a death sentence, California provides a list of potential sentencing considerations which assists the jury in making "its appropriateness determination during its normative weighing" of the evidence dealing with these factors. Several of these factors can only be mitigating and others including factors (a), (b), and (c) can be either aggravating or mitigating depending upon the nature and quality of the evidence. *People v. Boyde*, 46 Cal.3d 212, 254; 250 Cal.Rptr. 83, 107 (1986), affd.; *sub nom. Boyde v. California*, 494 U.S. 370 (1990).

Thus, while a California penalty phase jury "weighs" evidence indicating aggravation against evidence offered to show mitigation, its deliberative process is not confined and directed in the manner followed by "weighing" states. Not only is the limited direction provided by California's unique statutory scheme constitutional, *see, e.g.*, *Zant v. Stephens*, *supra*, 462 U.S. at 875; *California v. Ramos*, *supra*, 463 U.S. at 1008 n. 22, it precludes application of the *Stringer* vagueness analysis to the factors in section 190.3.

In their haste to argue that California's death penalty laws are similar to those of Mississippi, Petitioners bypass the significant differences which distinguish the two statutory schemes. Petitioners rely primarily upon labels and overlook the basic functional differences between the Mississippi capital punishment laws and those of California. Because the two states differ significantly in the ways that their respective death penalty statutes operate, application of the Eighth Amendment vagueness test articulated by this Court in its *Stringer* decision to California is neither factually nor constitutionally appropriate.

II.

THE THREE SPECIFIC SENTENCING FACTORS CHALLENGED BY PETITIONERS ARE NOT FACIALLY VAGUE NOR DOES THE CONSTITUTION REQUIRE THAT THEY BE CHARACTERIZED AS EITHER AGGRAVATING OR MITIGATING

Even if this Court were to review the three challenged sentencing factors for vagueness as Petitioners suggest, there is no basis for finding any of them constitutionally suspect. In *Bacigalupo II*, the California Supreme Court found under a newly created Eighth Amendment standard, that capital sentencing factors must be defined in terms sufficiently clear and specific that ordinary jurors can understand their meaning and they must direct the sentencer to evidence relevant to and appropriate for the penalty determination. 6 Cal.4th at 477; 24 Cal.Rptr.2d at 820. Whether tested under the *Bacigalupo II* standard or by traditional Fourteenth Amendment vagueness analysis, there is no basis for challenging any of the sentencing factors in section 190.3 Nor does the Eighth Amendment require that any of California's eleven sentencing factors be individually labelled as aggravating or mitigating factors.

A. "Circumstances Of The Crime" Has Already Been Held To Be A Proper Factor To Be Considered In Determining Penalty and Is Defined In Terms Which Are Both Clear And Specific

Obviously the circumstances of the crime, in and of themselves, will not satisfy the Eighth Amendment requirement of narrowing the class of death-eligible defendants. However, by the time a California jury considers evidence related to factor (a) in the penalty trial, it has already narrowed the death eligible class through a special circumstance finding and it is then "free to consider a myriad of factors to determine whether death is the appropriate punishment." *California v. Ramos*, *supra*, 463 U.S. at 1008. "The primary concern in the Eighth Amendment context had been that the sentencing decision be based on the facts and circumstances of the defendant, his background, *and his crime*." *Clemons v. Mississippi*, *supra*, 494 U.S. at 748, emphasis added. "It would be a rather strange jurisprudence," *Herrera v. Collins*, ___ U.S. ___, 113 S.Ct. 853, 863 (1993), which allowed a capital-eligible defendant to be sentenced to death without allowing the jury to fully consider whether the specific facts and circumstances of his case justified that sentence.

This Court has established the circumstances surrounding a capital offense as one of the criteria upon which the jury *should* base its penalty determination. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302, 318 (1989); *Booth v. Maryland*, 482 U.S. 496, 502 (1987), overruled on other grounds, *Payne v. Tennessee*, 501 U.S. ___,

111 S.Ct. 2597 (1991); *Jurek v. Texas*, 428 U.S. 262, 274, (1976). Moreover, there is no authority stating or implying that allowing a jury to consider the "circumstances of the offense" as a sentencing factor is unconstitutionally vague. *Jurek*, at 274.

Unlike the case of *Maynard v. Cartwright*, 486 U.S. 356, upon which Petitioners rely, Petitioners were both found death eligible because of one or more valid special circumstances. In Petitioner Proctor's case there are torture murder and two felony murder special circumstances, while in Petitioner Tuilaepa's case there is a felony murder special circumstance, all of which were initially found true beyond a reasonable doubt at the guilt phase in each case. The jury was then allowed to consider *all* of the other relevant factors set forth in California Penal Code section 190.3 *in addition to* the circumstances of the crime in determining whether the appropriate punishment in each case was death or life without the possibility of parole.

Bacigalupo II held that the Penal Code section 190.3 sentencing factors must also meet the dual standards of "specificity and of relevance." 6 Cal.4th at 477; 24 Cal.Rptr.2d at 820. Citing to this Court's Eighth Amendment cases, the California Supreme Court went on to hold that:

> To meet these dual criteria, sentencing factors should not inject into the individualized sentencing determination the possibility of

> "randomness" or "bias in favor of the death penalty." (*Stringer v. Black*, *supra*, 503 U.S. ___, ___ [117 L.Ed.2d at p. 382, 112 S.Ct. 1130 at p. 1139].) Inappropriate for consideration in the sentence selection process would be any aggravating factor that was either "seriously and prejudicially misleading," or that invited "the jury to be influenced by a speculative or improper consideration []," such as the race or political beliefs of the defendant that are without any bearing on moral culpability. (*People* v. *Ramos* (1984) 37 Cal.3d 136, 153 [207 Cal.Rptr. 800, 689 P.2d 430]; *Dawson* v. *Delaware* (1992) ___ U.S. ___ [117 L.Ed.2d 309, 112 S.Ct. 1093].)

Id. at 477; 24 Cal.Rptr.2d at 820.

In applying these two standards to factor (a), the California Supreme Court specifically rejected claims that this sentencing factor: (1) contains no narrowing factor; (2) provides no objective basis for appellate review of a death judgment; or (3) is impermissibly vague under the Eighth Amendment. The court specifically held that:

> Factor (a) uses clearly understandable terms to designate for jury consideration in sentence selection "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special

circumstances found to be true. . . ." (§ 190.3, factor (a).) In any criminal case the circumstances of the crime of which the defendant stands convicted are the single most pertinent sentencing consideration. Indeed, by directing the sentencer to consider the circumstances of the capital crime, factor (a) of section 190.3 embodies a consideration that the United States Supreme Court has identified as "'a constitutionally indispensable part of the process of inflicting the penalty of death.'" (*Johnson* v. *Texas*, *supra*, ___ U.S. ___ [125 L.Ed.2d 290, 301; 113 S.Ct. 2658, 2665]; *People* v. *Tuilaepa*, *supra*, 4 Cal.4th at p. 594; *People* v. *Proctor* (1993) 4 Cal.4th 499, 551 [15 Cal.Rptr.2d 340, 842 P.2d 1100].) Therefore, when a California jury considers the circumstances of a defendant's capital crimes for the purpose of making an individualized determination whether life without possibility of parole or death is the appropriate penalty for a defendant already determined to be within the narrowed class of death-eligible murderers, there can be no violation of the Eighth Amendment prohibition against cruel and unusual punishments.

6 Cal.4th at 478-479; 24 Cal.Rptr.2d at 820-821.

Petitioners have not argued in their brief on the merits that the three challenged Penal Code section

190.3 sentencing factors fail to meet the two standards announced in *Bacigalupo II*, although they clearly had the opportunity to do so. Since Petitioners apparently do not dispute this point, there is no basis for finding these challenged sentencing factors to be violative of the Eighth Amendment apart from Petitioners' *Stringer* claim which respondent has already addressed.

B. The "Other Violent Crimes" Factor Set Forth In California Penal Code, Section 190.3, Subdivision (b), Is Both Specific And Relevant On The Punishment Question And It Was Therefore Properly Used To Determine The Appropriate Penalty For Petitioner Tuilaepa

The California Supreme Court held that factor (b) directs the penalty phase jury to specific provable and commonly understood facts about the defendant in a capital crime that may bear on his moral culpability. Evidence of his criminal conduct, especially where acts of violence toward other people are involved, is of the "general type long considered by sentencing authorities" and are particularly relevant to the penalty decision. *Bacigalupo II*, 6 Cal.4th at 478, 24 Cal.Rptr.2d at 821, citing *Payne*, 111 S.Ct. 2597; *Barclay v. Florida*, 463 U.S. 939, 956 (1983).

The California Supreme Court considered the relevance of evidence showing other crimes of violence

admitted under factor (b) and found such evidence to be probative on the issue of penalty in capital cases. Thus, in *People v. Tuilaepa*, 4 Cal.4th 569, 15 Cal.Rptr.2d 382 (1992) the California Court stated:

> It is settled that the "facts and circumstances of the defendant, his background, and his crime" are relevant to the sentencing decision (*Clemons v. Mississippi* (1990) 494 U.S. 738, 748), and the State, within certain limits, has broad latitude to decide how such facts are to be presented and considered at the penalty phase. (*Payne v. Tennessee* (1991) 501 U.S. ___ [115 L.Ed.2d 720, 735]; *Boyde v. California* (1990) 494 U.S. 370, 377.) By the same token, the individualized penalty determination required by the Eighth Amendment makes inevitable application of the sentencer's own values, perceptions, and experiences to the factors the State deems properly relevant. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 110-112).
>
> Factor (b) focuses the sentencer's attention on other crimes (i.e., punishable offenses) committed by the defendant involving his use or threatened use of force against any person. (*People v. Phillips* (1985) 41 Cal.3d 29, 72; *People v. Boyde, supra*, 38 Cal.3d 762, 776.)

Id., at pp. 594-565; 15 Cal.Rptr.2d at 397-398. Tuilaepa JA 99.

Further, under *People v. Phillips*, 41 Cal.3d 29, 72-73 n. 25, 222 Cal.Rptr. 127, 155 n. 25 (1985), Petitioner Tuilaepa could have requested that the jury consider only specific enumerated other crimes under factor (b) and/or that the jury be instructed on the elements of those crimes. There was no such request by Petitioner Tuilaepa. The California Supreme Court conscientiously and methodically reviewed each alleged incident offered as factor (b) evidence and carefully reviewed the merits of Petitioners' arguments unless the claim had been waived. It found there was "no reasonable possibility the penalty verdict would have been different absent evidence of threats and insults [made by petitioner] against CYA personnel." Tuilaepa JA 93.

With respect to Petitioner Tuilaepa's claim that he was prejudiced by the factor (b) evidence introduced as an aggravating circumstance at his penalty trial, the California Supreme Court held that:

> Our review of the record discloses convincing evidence of all criminal conduct properly admitted under factor (b) – the fight with inmate Gages, the unprovoked assault on another ward outside the infirmary, the assault and robbery of inmate Chatters, and the possession of potentially

dangerous weapons while in CYA custody. There is no indication that an instruction on specific crimes and elements would have changed the jury's assessment of evidence admitted under factor (b) or would have affected the outcome at trial.

Tuilaepa JA 95.

In summary, petitioner Tuilaepa has failed to establish any factual or legal support for his claim that the factor (b) evidence introduced at his penalty trial violated the Eighth Amendment.

C. <u>A Jury Considering The Sentence In A Capital Case May Properly Consider Whether The Defendant's Age Is A Mitigating Or Aggravating Factor Since This Factor Is Clear, Specific, And Relevant To The Penalty Issue</u>

Petitioner Tuilaepa claims that Penal Code section 190.3, factor (i), the defendant's age, is unconstitutionally vague as applied in his case. According to the California Supreme Court, "[f]actor (i) directs the sentencer to consider whether the defendant's age at the time of the crime gives rise to an inference about his relative youth or maturity which in 'common experience or morality . . . might reasonably inform the choice of penalty. . . .'" *People v. Tuilaepa, supra*, 4 Cal.4th at 595, 15 Cal.Rptr.2d at 397.

This factor directs the sentencer's attention "to specific, provable, and commonly understandable facts about the defendant and the capital crime that might bear on his moral culpability." *Id.*, at 595, 15 Cal.Rptr. 2d at 397; *accord People v. Noguera*, 4 Cal.4th 599, 648-649; 15 Cal.Rptr.2d 400, 429 (1992).

In the *Tuilaepa* case the prosecutor argued first and was only allowed to argue once. The format of this argument compelled the prosecutor to anticipate what the defense lawyer would later argue during his closing remarks. Since the prosecutor was not allowed to rebut the defense argument, he therefore had to try and anticipate what the defense would claim was mitigating evidence and argue against it as best he could. This is why the prosecutor argued that *if* the defense argued age was a mitigating factor, the jury should closely examine this claim. Tuilaepa JA 11. The prosecutor merely argued that by the time he committed the charged offenses petitioner Tuilaepa was "old enough" to have been incarcerated; old enough to plan and commit a robbery; and old enough to be held accountable. Tuilaepa JA 12-13. The thrust of the prosecutor's argument was that the jury could not rely on Petitioner's age to "pass this off as the mere folly of youth." Tuilaepa JA 12-13. Thus, the prosecutor did not affirmatively argue that Petitioner Tuilaepa's age was an aggravating factor but merely attempted to show

that the defendant did not deserve lenience because of his age.

In this respect it is the rule under California law that a prosecutor may argue a defendant is less deserving of leniency because of his age, as opposed to more deserving of death. *People v. Rodriguez*, 42 Cal.3d 730, 789; 230 Cal.Rptr. 667, 705 (1986). A defendant's youth has mitigating value only to the extent that his conduct is attributable to his age. *Graham v. Collins*, 950 F.2d 1009, 1231 (5th Cir. 1992) (en bank), *affd. Graham v. Collins*, ___ U.S. ___, 113 S.Ct 892, 895 (1993).

Given his history, the prosecutor's argument regarding how the penalty phase jury should treat a claim that Petitioner Tuilaepa's age was a mitigating factor did not violate the Eighth Amendment. More importantly, allowing a jury in capital case to consider age as a sentencing factor is not barred by the Eighth Amendment. *Cf. Johnson v. Texas, supra*, 113 S.Ct. 2658 (holding that a jury must be able to consider youth as a mitigating factor with no suggestion that evaluation of age as an aggravating factor would violate the Eighth Amendment).

D. <u>There Is No Constitutional Requirement That The Factors Set Forth In California Penal Code Section 190.3 Be Individually Labelled As Either Aggravating Or Mitigating</u>

The California Supreme Court has properly and repeatedly rejected the argument that Penal Code section 190,.3 is unconstitutionally vague because its factors are not individually labelled as either aggravating or mitigating. *See, e.g., People v. Livaditis*, 2 Cal.4th 759, 784; 9 Cal.Rptr.2d 72, 87 (1992); *People v. Medina*, 51 Cal.3d 870, 908-909; 274 Cal.Rptr. 849, 874 (1990); *People v. McLain*, 46 Cal.3d 97, 118; 249 Cal.Rptr. 630, 642 (1988); *People v. Jackson*, 28 Cal.3d 264, 316, 168 Cal.Rptr. 603, 630 (1980). The California Supreme Court recently held that "'the aggravating or mitigating nature of these various factors should be self-evident to any reasonable person within the context of each particular case.'" *People v. Zapien*, 4 Cal.4th 929, 990, 17 Cal.Rptr.2d 122, 157 (1993), quoting *Jackson*, 28 Cal.3d at 316, 168 Cal.Rptr. 603, 630. This Court has also recognized that there is no likelihood that failure to give instructions specifically identifying the mitigating factors can result in an unreliable penalty determination. See *Graham v. Collins, supra*, ____ U.S. ____, 113 S.Ct. at p. 895.

Thus, Petitioner Proctor's challenge to the vagueness of the Penal Code section 190.3 sentencing

factors for failing to label the factors must also be rejected.

III.

THE PROSECUTOR'S ARGUMENT IN PETITIONER PROCTOR'S CASE THAT THE ABSENCE OF A MITIGATING FACTOR AMOUNTS TO AN AGGRAVATING CIRCUMSTANCE DOES NOT VIOLATE THE EIGHTH AMENDMENT SINCE THE JURY WAS PROPERLY INSTRUCTED ON THIS ISSUE

Finally, Petitioner Proctor claims that he is entitled to a reversal and a new penalty trial because the prosecutor briefly argued that the absence of three mitigating factors allowed the jury to consider these factors as aggravation. Petitioner claims that when this error is combined with the instruction that the jury "shall" return death if it found that aggravation outweighed mitigation, there is an unconstitutional exacerbation of the overall vagueness of Penal Code section 190.3 sentencing factors. Respondent disagrees.

In the Proctor case, the California Supreme Court found the challenged portion of prosecutor's argument amounted to *Davenport*[10] error but also found the error was harmless since the jury had been properly instructed on this question. Proctor JA 80. Petitioner's claim that the "shall" instruction creates a

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10. *See People v. Davenport*, 41 Cal.3d 247, 288-290, 221 Cal.Rptr. 794, 821 (1985)

mandatory death penalty statute has similarly been rejected, not only by the California Supreme Court but also by this Court. *Blystone v. Pennsylvania*, *supra*, 494 U.S. 299 and *Boyde v. California*, 494 U.S. 370 (1990).

Petitioner Proctor essentially argues the prosecutor did not correctly identify aggravating and mitigating factors during his closing argument.[11/] This claim raises a question of interpretation of the California statute regarding aggravating factors, but no federal question.

Petitioner virtually ignores several crucial factual aspects of this claim. For example, it should be noted that Petitioner did not object to the prosecutor's remarks and the prosecutor's argument was made before the California Supreme Court had issued its opinion in *People v. Davenport*, finding this type of argument to be improper under state law. It is also important to note that the trial court specifically instructed the jury that the absence of mitigating evidence on a specific factor "of itself does not make that factor an aggravating factor." Proctor JA 80.

The California Supreme Court found the prosecutor's argument to be harmless error under state

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11. In the California Supreme Court Petitioner Proctor merely argued that the Prosecutor committed *Davenport* error as to factors (d), (e), and (f). JA p. 144-145. Petitioner Proctor now claims for the first time that factors (h) and (j) must be added to this list.

statutes and petitioner therefore fails to establish a federal question. *Estelle v. McGuire*, ___ U.S. ___, 112 S.Ct. 475 (1991). The state court carefully and rigorously analyzed Petitioners' claim and found that it lacked merit. Proctor JA 148-153.

Petitioner Proctor also contends that the instruction that the jury "shall" impose death if aggravation outweighs mitigation and the prosecutor's argument increased the vagueness of the Penal Code section 190.3 sentencing factors. Proctor Brief at 24-25. *Boyde v. California*, *supra*, 494 U.S. 370, is dispositive of Petitioner's claim. This Court held in *Boyde* that the "unadorned" factor (k) instruction did not prevent the jury's consideration of section 190.3 mitigating evidence regarding the defendant's of background and character. *Id.*, at 381. This satisfies the constitutional requirement of individualized sentencing in capital cases. *Id.*, at 377, citing *Blystone*, 494 U.S. at 307. In context, the District Attorney's brief argument in the Proctor case that the death penalty was "necessary" or that the jury was "obligated to return a verdict of death" simply contended that the aggravating evidence was overwhelming while evidence of mitigation was insubstantial. Proctor JA 23, 32.

Petitioner has again failed to state a basis for relief.

CONCLUSION

The California Supreme Court's judgments, upholding the convictions and death sentences in both cases, should be affirmed and Petitioners' request for relief from this Court must be denied.

Dated: February 24, 1994.

Respectfully submitted,

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No. 93-5131

In The

Supreme Court of the United States

October Term, 1993

PAUL PALALAUA TUILAEPA,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of California

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ARGUMENT

Petitioner submits the following points in response to the briefing by respondent and amicus CJLF:

1. In arguing that Eighth Amendment vagueness analysis is inapplicable to petitioner's penalty trial (Respondent's Consolidated Brief on the Merits, hereinafter "RCB," pp. 23-51), respondent does not address the specific instructions, arguments, or verdict forms given to petitioner's sentencing jury. Instead, respondent relies on the California Supreme Court's recent reinterpretation of the State's capital sentencing scheme in *People v. Bacigalupo*, 6 Cal.4th 457, 862 P.2d 808 (1993). Respondent says that the approach taken in *Bacigalupo* is "entirely consistent with the previous decisions of that court" (RCB at 38-39) and that the state court has never suggested the state scheme operates in the same manner as "another state wherein aggravating factors have been held to have constitutional significance" (RCB at 36).

Both statements are incorrect. First, in *People v. Visciotti*, 2 Cal.4th 1, 74, 825 P.2d 388 (1992), *cert. denied*, 113 S.Ct. 267 (1992), the court *explicitly* stated that the Eighth Amendment requirements of *Godfrey* "undoubtedly extend[] to aggravating factors identified in section 190.3." Second, prior to *Bacigalupo* the court consistently emphasized the focal role of section 190.3's enumerated factors in determining a capital sentence[1] and described

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[1] *See, e.g., People v. Kaurish*, 52 Cal.3d 648, 706, 802 P.2d 278 (1990), *cert. denied*, 112 S.Ct. 121 (1991); *People v. Hovey*, 44 Cal.3d 543, 583, 749 P.2d 776 (1988), *cert. denied*, 488 U.S. 871 (1988); *People v. Brown*, 40 Cal.3d 512, 544, 709 P.2d 440 (1985), *rev'd* on

the function of aggravating factors under the California scheme as "essentially equivalent" and "almost identical" to that of aggravating factors in Florida. *People v. Frierson*, 25 Cal.3d 142, 180, 599 P.2d 587 (1979); *People v. Brown*, 40 Cal.3d 512, 542-544, 709 P.2d 440 (1985).

Bacigalupo is a novel interpretation of section 190.3. It was not the law presented to petitioner's jury, which was given a list of enumerated circumstances, told that it must base its decision on these circumstances, and could not return a sentence of death without signing a verdict form finding the "aggravating circumstances substantially outweigh the mitigating circumstances." (JA 66.)

2. Petitioner's Brief (hereafter "PB"), at 13-14, cited an unbroken line of cases from *Maynard v. Cartwright*, 486 U.S. 356, 363-364 (1988), through *Espinosa v. Florida*, 505 U.S. ___, 120 L.Ed.2d 854, 112 S. Ct. 2926 (1992), and *Arave v. Creech*, 507 U.S. ___, 113 S.Ct. 1534 (1993), in which this Court applied the *Godfrey* analysis to aggravating factors whose only use was in the weighing process leading to death. Ignoring these cases, respondent and its amicus, the Criminal Justice Legal Foundation ("CJLF"), assert that the application of *Godfrey* to factors used to determine whether a defendant should live or die would significantly alter this Court's capital jurisprudence by requiring "yet another level of narrowing." (RCB at 43.)

This case does not remotely present the question whether the Eighth Amendment requires another level of

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other grounds *sub nom, California v. Brown*, 479 U.S. 538 (1987); *People v. Boyd*, 38 Cal.3d 762, 773, 700 P.2d 782 (1985).

narrowing. This Court has long held that a state procedure is subject to constitutional scrutiny even though the procedure itself is not constitutionally required. For example, although a state is not required to provide a full-scale preliminary hearing to determine probable cause to hold a defendant for trial, *Gerstein v. Pugh*, 420 U.S. 103 (1972), if it chooses to provide such a hearing it must furnish counsel for the defendant. *Coleman v. Alabama*, 399 U.S. 1 (1970). Similarly, although a state is not required to include the absence of an affirmative defense in defining the elements of a crime, *Patterson v. New York*, 432 U.S. 197 (1977), if it chooses to do so it must assume the constitutional burden of proof as to that element. *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

Likewise, when a state has affirmatively *chosen* to provide guidance to the sentencer in the form of enumerated factors to be weighed in aggravation and mitigation it may not allow the sentencer to rely on aggravating factors which are unconstitutionally vague. Justice Kennedy's opinion in *Stringer* explicitly recognized this critical point:

> Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content.

Stringer v. Black, 503 U.S. ___, 112 S.Ct. 1130, 1139 (1992).

3. Respondent suggests that the Court's decisions in *California v. Brown*, 479 U.S. 538 (1983) and *Pulley v. Harris*, 465 U.S. 37 (1976) have resolved the issue presented here. (RCB at 47-48.) Nothing in either decision supports the proposition that California is free to require

the jury to weigh vague aggravating factors in determining whether a defendant should live or die.

Neither case addressed the vagueness of aggravating factors. Cases are not authority for propositions not considered. *See Webster v. Fall*, 266 U.S. 507, 511 (1925). In *California v. Brown*, the Court simply held that the Eighth Amendment did not preclude an instruction advising the jury not to be swayed by "mere sympathy." In *Pulley v. Harris*, the Court rejected an attack under *Furman* on an earlier version of the California statute based on its failure to provide intercase proportionality review.[2] The fact that the Court has found other aspects of the California scheme constitutional does not speak to the question whether a particular aggravating factor is unconstitutionally vague. *Compare Proffit v. Florida*, 428 U.S. 242 (1976) (upholding the Florida scheme against *Furman* attack) *and Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909 (1976) (same with respect to the Georgia scheme) *with Espinosa v. Florida*, 505 U.S. ___, 112 S.Ct. 2926 (1992)

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[2] Respondent's citation of *Harris* for the proposition that the current California death penalty law "limits the death sentence to a small subclass of capital-eligible cases" is misleading. (RCB at 39, quoting *Harris*, 465 U.S. at 53.) The statute at issue in *Harris* was the 1977 death penalty law. It listed seven special circumstances, one of which included five types of "willful, deliberate, and premeditated" felony-murder. *See Harris*, 465 U.S. at 51, fn. 13; former Cal. Penal Code § 190.2 (Cal. Stats. 1977, ch. 316, § 9). In contrast, the 1978 version of the law applied in Petitioner's case greatly expanded the number of special circumstances, listing nineteen special circumstances, one of which includes nine types of felony murder without the heightened mens rea required by the 1977 statute. Cal. Penal Code § 190.2.

(holding a particular aggravating factor under Florida law unconstitutionally vague) *and Godfrey v. Georgia*, 446 U.S. 420 (1980) (same with respect to an aggravating factor under Georgia law).

4. Respondent and CJLF both argue that the Court's decision in *California v. Ramos*, 463 U.S. 992 (1983), support the proposition that petitioner's jury could properly weigh vague aggravating factors in sentencing him to die because these factors were used in the weighing process which led to death rather than in the narrowing process that made him eligible for the death sentence. (RCB at 30, 47; CJLF Brief at 10.)[3] Nothing in *Ramos* supports that proposition, because *Ramos* involved a jury instruction which was used *neither* to narrow the death eligible class *nor* as an aggravating factor in the weighing process.

Ramos was sentenced to death under the same California scheme at issue here, and the jury was instructed to weigh the enumerated aggravating and mitigating factors to reach its sentencing decision. 463 U.S. at 995 and n.3. The defendant challenged the trial court's provision of the "Briggs Instruction," an instruction which informed the sentencing jury about the Governor's power to commute a sentence of life without the possibility of parole.[4] This Court viewed the

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[3] CJLF goes further, boldly suggesting that the actual "Question Presented" in this case is whether *Stringer* overruled *Ramos*. (CJLF Brief at i.)

[4] At the time, Penal Code section 190.3 required the trial court to instruct the jury:

> "that a sentence of confinement to state prison for a term of life without possibility of parole may in future

instruction as an invitation for the jury to consider a defendant's "future dangerousness" if released from prison. *California v. Ramos, supra,* 463 U.S. at 1003. Relying on *Jurek v. Texas,* 428 U.S. 262 (1976), the Court held that the Constitution did not prohibit the jury from considering the question of the defendant's future dangerousness or from receiving accurate information about one of its sentencing options.

The commutation instruction at issue in *Ramos* has *never* been a part of the list of aggravating and mitigating factors California juries have been told to weigh in determining whether a defendant should live or die. Justice O'Connor's opinion for the Court makes clear not only that the instruction was merely "informational," but that the jury was not advised or encouraged to reach its verdict in reliance upon this information. *California v. Ramos,* 463 U.S. at 1012, n.29.[5]. The Briggs instruction was given "[i]n addition" to the instructions on aggravating and mitigating factors. *Id.* at 995.

Respondent and CJLF's contention that *Ramos* supports the use of vague aggravating factors in the weighing process has been squarely rejected by this Court. In *Stringer,* as here, CJLF argued that where a state had

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after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California."

[5] In a decision issued subsequent to *Ramos,* the state supreme court made clear that under state law the only matters to be weighed in the penalty determination are the aggravating and mitigating circumstances listed in Penal Code section 190.3. *People v. Boyd,* 38 Cal.3d 762, 773, 700 P.2d 782, 790 (1985).

already narrowed the class of death eligible defendants, *Ramos* allowed it to use vague aggravating factors. (*Stringer v. Black,* Brief of Amicus CJLF at 12-13.) Mississippi adopted CJLF's position on *Ramos* in oral argument (*Stringer v. Black,* Transcript of oral argument at 14-16.) *Stringer* rejected that argument. 112 S.Ct. at 1139. Respondent and CJLF's interpretation of *Ramos* is no different and no better than it was two years ago.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

PAUL PALALAUA TUILAEPA (No. 93-5131),
Petitioner,

vs.

THE STATE OF CALIFORNIA,
Respondent.

WILLIAM ARNOLD PROCTOR (No. 93-5161),
Petitioner,

vs.

THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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No. 93-5131
No. 93-5161

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

PAUL PALALAUA TUILAEPA (No. 93-5131),
Petitioner,

vs.

THE STATE OF CALIFORNIA,
Respondent.

WILLIAM ARNOLD PROCTOR (No. 93-5161),
Petitioner,

vs.

THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE CALIFORNIA APPELLATE PROJECT IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The California Appellate Project ("CAP") is a non-profit corporation established by the State Bar of California. It is funded by the California Judicial Council to train and assist appointed counsel in providing representation in state death penalty appeals and habeas corpus proceedings. Pursuant to a grant from the Administrative Office of the United States Courts, CAP also

assists the federal courts by recruiting, training and assisting appointed counsel in federal habeas corpus proceedings on behalf of death-sentenced prisoners in California.

As an organization that provides assistance in many of the pending death judgment cases in California, CAP is in a unique position to provide the Court with an analysis of the questions presented in these consolidated cases.

CAP has received written consent of the parties to file this amicus brief.

SUMMARY OF ARGUMENT

When a state uses aggravating factors to minimize the risk of arbitrary imposition of the death sentence, it may not use factors which as a practical matter fail to guide the sentencer's discretion. In California, the instructions given to the jury make clear beyond any doubt that aggravating factors are a critical component of the jury's decision whether a defendant should live or die. Thus, these aggravating factors must comply with the Eighth Amendment; they must furnish the sentencer with clear standards that provide specific guidance as to whether death should be imposed.

In the two cases upon which certiorari has been granted, jurors were instructed that in determining if the defendant should be put to death, they could find and weigh as an aggravating factor "the circumstances of the crime" and the "age of the defendant." On their face, neither of these aggravating factors provides the sentencer with the type of specific and detailed guidance essential to aggravating factors used in determining if a defendant will live or die. Because the state supreme court has failed to provide any limiting construction of these factors, they have been used, from case to case, to generate illusory aggravators and inject constitutionally impermissible randomness and arbitrariness into the sentencing process.

A further source of confusion in the application of California's capital sentencing scheme is the California statute's failure to designate which of the statutory sentencing factors are mitigating. Although the state supreme court has construed seven of the factors to be exclusively mitigating, the court has declined to

require trial courts to either inform the jury that these factors are mitigating circumstances or delete these factors from the penalty phase instructions when they are factually irrelevant. As a result, in many California cases, juries have been invited to convert the absence of a statutory mitigating circumstance into the presence of an aggravating circumstance, thereby placing additional illusory factors on death's side of the scale and further distorting the decision making process.

ARGUMENT

The Eighth Amendment principles that apply to this case are clearly established by the Court's decisions. When a state chooses to impose capital punishment, the Eighth Amendment requires it to "adopt procedural safeguards against arbitrary and capricious impositions of the death penalty." *Sawyer v. Whitley*, 505 U.S. ____, 112 S. Ct. 2514, 2520 (1992). *Accord Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976). A state capital punishment scheme must comply with the Eighth Amendment's "fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action" in imposing the death penalty. *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988).

Where a state elects to meet this Eighth Amendment obligation by articulating a set of aggravating and mitigating factors, and where the aggravating factors are critical "in deciding who shall be eligible for the death penalty or who shall receive the death penalty, [the state] cannot use factors which as a practical matter fail to guide the sentencer's discretion." *Stringer v. Black*, 503 U.S. ____, 112 S. Ct. 1130, 1139 (1992). Thus, as the Court has repeatedly made clear, in states like Florida, Mississippi and Oklahoma — where the sentencer is told that it must weigh aggravating and mitigating factors to determine if a defendant should live or die — the state may not rely on unconstitutionally vague aggravating factors. *See, e.g., Espinosa v. Florida*, 505 U.S. ____, 112 S. Ct. 2926 (1992) (Florida); *Shell v. Mississippi*, 498 U.S. 1 (1990) (Mississippi); *Maynard v. Cartwright*, 486 U.S. 356 (1988) (Oklahoma).

I

THE AGGRAVATING FACTORS THAT A CALIFORNIA JURY WEIGHS IN DETERMINING WHETHER A DEFENDANT SHOULD LIVE OR DIE ARE CENTRAL TO THE PENALTY DETERMINATION.

As two Justices of this Court have recently noted, California — just like Florida, Mississippi and Oklahoma — "requires its juries to weigh aggravating and mitigating circumstances" in determining whether death is an appropriate penalty. *Pensinger v. California*, ___ U.S. ___, 112 S. Ct. 351 (1991) (O'Connor, J., dissenting from the denial of certiorari, joined by Kennedy, J.) *See also Boyde v. California*, 494 U.S. 370, 374, 377 (1990) (observing that California juries are told to weigh aggravating and mitigating circumstances in determining penalty); *California v. Brown*, 479 U.S. 538, 540 (1987) (same); *California v. Ramos*, 463 U.S. 992, 995 n.3 (1983) (same).

The statute explicitly requires the jury to determine the appropriate punishment by weighing aggravating circumstances against mitigating circumstances:

> [The trier of fact] shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in a state prison for life without the possibility of parole.

Cal. Pen. Code § 190.3.

The California Supreme Court has itself long recognized that the role of aggravating and mitigating factors in the penalty determination process is identical to the role those factors play in Florida, a state statute with which this Court has much experience. As early as 1979, in interpreting a predecessor statute to the current law which provided that the jury was to be guided by a list of aggravating and mitigating factors almost identical to that present in the current statute, the state court concluded that the factors set forth in section 190.3 are "essentially equivalent to the provision in the valid Florida statute requiring the sentencing

authority to 'weigh' [aggravating and mitigating] factors in reaching its decision." *People v. Frierson*, 25 Cal.3d 142, 180, 599 P.2d 587, 610 (1979).[1] The "California statute lists specific factors which must be considered in deciding whether or not to impose the death penalty." *Id.* at 177, 599 P.2d at 608. The state court explicitly concluded that use of the aggravating and mitigating factors under the California scheme was "almost identical" to the use of such factors in Florida. *Id.*

The state court has taken a similar view in interpreting the current statute, which requires that the jury not merely be "guided by" the aggravating and mitigating factors but "shall impose" death if aggravating factors outweigh mitigating factors. Reaffirming the central role played by the aggravating and mitigating factors, the court has noted that section 190.3 "require[s] the jury to decide the appropriateness of the death penalty by a process of weighing the specific factors listed in the statute." *People v. Boyd*, 38 Cal.3d 762, 773, 700 P.2d 782, 790 (1985). Indeed, as *Boyd* held, under the current statute, unlike the 1977 statute, the list of factors is exclusive, thus making the role of the statutory aggravating factors all the more important. *Id.* at 772-73, 700 P.2d at 789-90.

In a series of more recent cases, the court has continued to emphasize the critical role played by aggravating factors in the determination of penalty, noting that "the crux of the jury's decision is the weighing of aggravating and mitigating factors ...." *People v. Kaurish*, 52 Cal.3d 648, 706, 802 P.2d 278, 309 (1990), *cert. denied*, 112 S. Ct. 121 (1991). *Accord People v. Brown*, 40 Cal.3d 512, 544, 709 P.2d 440, 458 (1985), *rev'd. on other grounds*, 479 U.S. 538 (1987) ("[Section 190.3] simply

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[1] The predecessor statute was former California Penal Code section 190.3, a provision of California's 1977 death penalty legislation in effect from August 11, 1977 (Cal. Stats. 1977, ch. 316) until November 8, 1978, when it was superseded by the current statute, enacted by Initiative Measure, approved November 7, 1978. The factors listed under former section 190.3 were essentially identical to the factors listed under the current statute, with one exception, i.e., former section 190.3 did not include what is now factor (c) covering prior felony convictions.

makes clear that, in resolving the ultimate issue of punishment ... the jurors are to limit their consideration to 'the specific factors listed in the statute.' ")[2]

Amicus recognizes that in a case decided *after* this Court granted certiorari in *Proctor* and *Tuilaepa*, the state court has departed from its historic view as to the role of aggravating factors under the California statute. The state court has now held that because the factors in section 190.3 are "only" used to determine whether a defendant should live or die, and do not determine whether the defendant is "death eligible," the full dictates of the Eighth Amendment do not apply to those factors. *People v. Bacigalupo*, 6 Cal.4th 457, 475, 862 P.2d 808, (1993), *on remand from Bacigalupo v. California*, 506 U.S. ____, 113 S. Ct. 32 (1992).

In reaching this conclusion, the state court also articulated a very new, and much more limited, role for the factors set forth in section 190.3, a role that it concluded exempts these factors from the Eighth Amendment scrutiny applied to aggravating factors in every other state. According to the state court's current view, the factors set forth in section 190.3 are no longer "essentially equivalent" to the aggravating factors in Florida. Instead, "the section 190.3 'aggravating' factors in California's capital sentencing scheme do no more than direct attention" to "facts about the offense and the offender that will weigh in the sentencing decision in favor of the more severe penalty of death." *People v. Bacigalupo*, 6 Cal.4th at 477, 862 P.2d at ____. On this basis, the

[2] In *Brown*, the state court also held that the weighing process mandated by state law was not to be a mere counting of aggravating and mitigating factors. Instead, the jury was to weigh aggravating and mitigating factors and decide if death was the appropriate punishment. 40 Cal.3d at 543-44, 709 P.2d at 455-56. In reaching this interpretation, the state court once again explicitly reaffirmed that it was construing the California statute to be just like Florida's. *Id.* at 543, 709 P.2d at 456-57. *See Barclay v. Florida*, 463 U.S. 939, 963-64 (1983) (concurring opinion of Stevens, J., describing Florida scheme). Indeed, the same is true in Mississippi; although the jury is told to weigh aggravating and mitigating circumstances, its ultimate responsibility is to determine if death is the appropriate punishment. Miss. Code Ann. § 99-19-101(d).

court concluded that the state was free to use factors which as a practical matter fail to guide the sentencer's discretion. *Id.*

Of course, as a matter of federal law, the state court's view that aggravating factors used only to determine whether a defendant should live or die are exempt from full constitutional scrutiny is simply wrong. Justice Kennedy's opinion for the Court in *Stringer v. Black* could not have been more clear as to this point, squarely holding that "if a State uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive the death penalty, [the State] cannot use factors which as a practical matter fail to guide the sentencer's discretion." 503 U.S. at ____, 112 S. Ct. at 1139.

Conceivably, if a jury were instructed in accord with the state court's current view of the limited role of section 190.3 factors, the state might be free at the penalty phase to call the jury's attention to facts which do not in any way objectively guide the sentencer's discretion.[3] However, in the two cases now before this Court — and others presented to sentencing juries prior to the state court's recent *Bacigalupo* decision — the instructions and argument given simply do not reflect the state court's current limited view of the section 190.3 factors. *See Shuttlesworth v. Birmingham*, 382 U.S. 87, 91-92 (1965) (in addressing a vagueness challenge to a state statute, courts must look at judicial interpretations of the statute at the time it was applied to defendant). *Accord Smith v. Goguen*, 415 U.S. 566, 570-72 (1974); *Lanzetta v. New Jersey*, 306 U.S. 451, 456-57 (1939). To the contrary, these instructions are consistent with the state court's then current approach to section 190.3 which "require[d]

[3] If this were the case, however, the full burden of insuring that the jury receives constitutionally adequate guidance would necessarily fall upon the "special circumstance" findings made at the guilt phase. Given that California has the broadest array of special circumstance findings used to make a defendant death eligible in the entire country, intended by the drafters of the statute in their own words to "apply to every murderer," it is not at all clear that California would be left with a constitutional statute under this construction. 1978 California Voter's Pamphlet, p. 34, Argument in Support of Proposition 7. This question is not before the Court in these cases, however.

[the] jur[y] to weigh [the] aggravating and mitigating circumstances" in determining whether death was an appropriate penalty. *Pensinger v. California*, ____ U.S. at ____, 112 S. Ct. at 351.

In fact, consistent with the state court's longstanding approach to section 190.3, an examination of California capital cases shows beyond any doubt that prosecutors throughout the state have long been advising juries that the process they are required to engage in before imposing a death sentence is a weighing of the statutory aggravating and mitigating factors. The following are representative arguments from prosecutors in California death penalty trials:

- "You might list all of the mitigating factors on one side of the scale, list all of the aggravating factors on the other side of the scale, and make a finding of fact and answer this question: Did the aggravating factors outweigh the mitigating factors? . . . If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death." *People v. Hendricks*, 44 Cal.3d 635, 658, 749 P.2d 836, 849, *cert. denied*, 488 U.S. 900 (1988).

- "If you decide that the aggravating circumstances outweigh the mitigating circumstances, then you must return a verdict of death." *People v. McLain*, 46 Cal.3d 97, 117, 757 P.2d 569, 580 (1988), *cert. denied*, 489 U.S. 1072 (1989).

- "If you find that aggravating factors outweigh, and it can be a slight outweigh, it will be your obligation to return a verdict of death." *People v. Boyde*, 46 Cal.3d 212, 262-63, 758 P.2d 25, 55 (1988), *aff'd*, 494 U.S. 370 (1990).

- "The law . . . boils down to a simple solution of balancing. You have to balance in this case a set of aggravating factors versus a set of mitigating factors. And if you find that one of the factors outweighs the other, then it's simply your duty as jurors to make a decision in favor of those factors which outweigh the other." *People v. Bean*, 46 Cal.3d 919, 956, 760 P.2d 996, 1019 (1988), *cert. denied*, 494 U.S. 1038 (1990).

- "[I]f you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose the sentence of death." *People v. Hamilton*, 48 Cal.3d 1142, 1181, 774 P.2d 730, 754 (1989), *cert. denied*, 494 U.S. 1039 (1990).

- If aggravating factors outweigh mitigating factors "[y]ou do not have [any] discretion. . . . [I]t is your duty to return a verdict of death." *People v. Kaurish*, 52 Cal.3d 648, 713-14, 802 P.2d 278, 314 (1990), *cert. denied*, 112 S. Ct. 121 (1991).

- "So if you conclude that the aggravating circumstances outweigh the mitigating circumstances, you are obligated to return a verdict of death." *People v. Proctor*, 4 Cal.4th 499, 547, 842 P.2d 1100, 1128 (1992), *cert. granted*, 114 S. Ct. 598 (1993).

These statements illustrate that in practice, as well as under the state court's longstanding construction of the state statute, the aggravating and mitigating factors set forth in section 190.3 are central to the penalty determination. Indeed, in accord with the statute, prosecutors arguing for a death sentence have often prepared and presented charts containing a list of the aggravating and mitigating factors in a particular case and taken pains to urge the jury to find each and every aggravating factor on the list.[4] This approach is a natural response to a scheme which requires the

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[4] *See, e.g., People v. Montiel*, 5 Cal.4th 877, 939 n.36, 855 P.2d 1277, 1313 n.36 (1993); *People v. Clark*, 3 Cal.4th 41, 165 n.24, 833 P.2d 561, 632 n.24 (1992), *cert. denied*, 113 S. Ct. 1604 (1993); *People v. Hardy*, 2 Cal.4th 86, 202, 825 P.2d 781, 852, *cert. denied*, 113 S. Ct. 498 (1992); *People v. Gonzalez*, 51 Cal.3d 1179, 1228-29, 1230 n.28, 800 P.2d 1159, 1184-85 n.28 (1990), *cert. denied*, 112 S. Ct. 117 (1991); *People v. Douglas*, 50 Cal.3d 468, 537, 788 P.2d 640, 681 (1990), *cert. denied*, 498 U.S. 1110 (1991); *People v. Hamilton*, 48 Cal.3d 1142, 1183-86, 774 P.2d 730, 755-57 (1989), *cert. denied*, 494 U.S. 1039 (1990); *Id.* at 1188 and 1192 (Broussard, J., dissenting in part); *People v. Guzman*, 45 Cal.3d 915, 971-72, 755 P.2d 917, 952-53 (1988), *cert. denied*, 488 U.S. 1050 (1989) (Mosk, J., dissenting in part); *People v. Ghent*, 43 Cal.3d 739, 782, 739 P.2d 1250, 1278 (1987), *cert. denied*, 485 U.S. 929 (1988) (Broussard, J., concurring).

jury to weigh aggravating and mitigating factors. Obviously, before a jury can weigh such factors, it must necessarily make a finding as to which aggravating factors actually go into the weighing process. It is inconceivable that a jury charged with the solemn task of weighing aggravating and mitigating factors to determine whether a defendant will live or die would engage in that task without deciding which aggravating factors have been established. Indeed, it is impossible to engage in the mandated weighing process without making findings regarding the existence or non-existence of particular aggravating factors.[5]

It is clear, therefore, that aggravating factors under the California scheme are a critical facet of the jury's decision whether to sentence a defendant to death. Their function in the sentencing process subjects them to the constitutional rule that where a state chooses to make "aggravating factors . . . central in the weighing phase of a capital sentencing proceeding . . . use of a vague or imprecise aggravating factor in the weighing process invalidates the sentence and at the very least requires constitutional harmless error analysis or appellate reweighing in the state judicial system." *Stringer v. Black*, 503 U.S. at ____, 112 S. Ct. at 1140.[6]

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[5] In *Proctor v. California*, No. 93-5161, the jury was instructed that "before you may consider a particular aggravating circumstance to be true, you must be satisfied of the existence of that aggravating circumstance beyond a reasonable doubt." (RT 1558.)

[6] In *Proctor* and *Tuilaepa* the instructions, closing arguments and verdict forms made quite clear that the aggravating factors were critical to the jury's ultimate determination of penalty. *Proctor v. California*, No. 93-5161, RT 1474, 1558, 1562; CT 479 (instructions, argument and verdict forms all told the jury that if aggravating factors outweighed mitigating factors, it was required to impose a death sentence); *Tuilaepa v. California*, No. 93-5131, (RT 839, 864, 870, 885-87; CT 225-26) (instructions, argument and verdict forms all told the jury that the weighing process was central to the sentencing determination, and that death could be imposed only if the aggravating circumstances substantially outweighed the mitigating circumstances).

II

WHERE A SENTENCING JURY IS INSTRUCTED TO WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES IN DETERMINING WHETHER THE DEFENDANT SHOULD LIVE OR DIE, INSTRUCTING THE JURY TO WEIGH AS AN AGGRAVATING CIRCUMSTANCE THE "CIRCUMSTANCES OF THE CRIME" OR THE "AGE" OF THE DEFENDANT VIOLATES THE EIGHTH AMENDMENT.

A. An Aggravating Factor Is Unconstitutionally Vague Where Its Own Terms Furnish No Discernible Standards For The Sentencer And The State Courts Have Failed To Provide A Limiting Construction.

This Court has repeatedly held that when a state chooses to rely upon the presence of aggravating factors to satisfy the "fundamental constitutional requirement [of] sufficiently minimizing the risk of wholly arbitrary and capricious action," those factors must furnish the sentencer with "clear and objective standards" that provide "specific and detailed guidance." *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980); *Gregg v. Georgia*, 428 U.S. 153, 198 (1976); *Proffitt v. Florida*, 428 U.S. 242, 253 (1976). An aggravating factor is unconstitutionally vague "if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." *Espinosa v. Florida*, 505 U.S. at ____, 112 S. Ct. at 2928.

The first step in deciding whether a particular aggravating factor is unconstitutionally vague is to "determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer." *Arave v. Creech*, 507 U.S. ____, 113 S. Ct. 1534, 1541 (1993). If the language is indeed vague, the next step is to determine whether the "state courts have further defined the vague terms" with a constitutionally sufficient limiting construction. *Id.*

To determine whether an aggravating circumstance is unclear —or whether a proper limiting construction has been utilized— requires an inquiry into state court applications of the aggravating

factor. *See, e.g. Sochor v. Florida*, 504 U.S. ____, 112 S. Ct. 2114, 2121-22 (1992); *Proffitt v. Florida*, 428 U.S. at 255, n.12 (joint opinion of Stewart, Powell and Stevens, JJ.). *Accord Arave v. Creech*, 507 U.S. at ____, 113 S. Ct. at 1544. Where those applications reveal that the state courts have never articulated a limiting construction which provides "specific and detailed guidance," the aggravating factor is constitutionally infirm. *Maynard v. Cartwright*, 486 U.S. at 360-64; *Godfrey v. Georgia*, 446 U.S. at 428-33. *See also Clemons v. Mississippi*, 494 U.S. 738, 756 (1990) (Blackmun, J. concurring).

B. Instructing The Jury In The Bare Terms Of Penal Code Section 190.3(a) To Weigh The "Circumstances Of The Crime" Aggravating Factor In Deciding Whether A Defendant Should Live Or Die, Without Any Limiting Construction, Is Unconstitutional.

California Penal Code section 190.3(a) authorizes the sentencing jury to weigh the "circumstances of the crime" as an aggravating factor. There can be no serious dispute that this statutory language "fails to furnish principled guidance for the choice between death and a lesser penalty." *Richmond v. Lewis*, 506 U.S. ____, 113 S. Ct. 528, 534 (1992).

In fact, the Court has long held that a sentencer may *not* simply look at the circumstances surrounding a crime and determine that a death penalty is appropriate. *See, e.g., Maynard v. Cartwright*, 486 U.S. at 363; *Godfrey v. Georgia*, 446 U.S. at 429-33; *Furman v. Georgia*, 408 U.S. 238, 239-40, 255-57, 309-10, 314 (1972). As the Court concluded unanimously in *Maynard*, "[w]e have plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." 486 U.S. at 363. *Accord Cartwright v. Maynard*, 822 F.2d 1477, 1491 (10th Cir. 1987), *aff'd*, 486 U.S. 356 (1988) ("the discretion of a sentencer who can rely upon all the circumstances of a murder is as complete and as unbridled as the discretion afforded the jury in *Furman*").

Thus, on its face the aggravating factor set forth in section 190.3(a) violates the Eighth Amendment's requirement that aggravating factors central to the penalty determination furnish the sentencer with "clear and objective standards" that provide "specific and detailed guidance." The question then becomes whether the state courts have articulated and applied a limiting construction to this factor.

Certainly the state supreme court has never articulated a limiting construction of the "circumstances of the crime" aggravating factor. That court has seen no need to do so because it has consistently held that the language of the statute is neither '"illusory' nor otherwise impermissibly 'vague'." *People v. Tuilaepa*, 4 Cal.4th at 595, 842 P.2d at 1158. *Accord People v. Proctor*, 4 Cal.4th at 551, 842 P.2d at 1130; *People v. Noguera*, 4 Cal.4th 599, 648-49, 842 P.2d 1160, 1189-90 (1992); *People v. Sims*, 5 Cal.4th 405, 465-66, 853 P.2d 992, 1030 (1993). Indeed, in admitting that it had not yet "explored the outer reaches" of facts which would comprise the "circumstances of the crime" aggravating factor, the state court has actually expanded the definition of this factor, noting that it "does not mean merely the immediate temporal and spatial circumstances of the crime." *People v. Edwards*, 54 Cal.3d 787, 833, 835, 819 P.2d 436, 467 (1991), *cert. denied*, 113 S. Ct. 642 (1992) (emphasis added).

Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, the state supreme court has never applied a limiting construction to this factor. Instead, the state court has remained true to the extraordinary expansion of this factor announced in *Edwards*, approving reliance on the "circumstance of the crime" aggravating factor because defendant had a "hatred of religion,"[7] or because three weeks after the crime defendant sought to conceal evidence,[8] or threatened wit-

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[7] *People v. Nicolaus*, 54 Cal.3d 551, 581-82, 817 P.2d 893, 908-09 (1991), *cert. denied*, 112 S. Ct. 3040 (1992).

[8] *People v. Walker*, 47 Cal.3d 605, 639 n.10, 765 P.2d 70, 90 n.10 (1988), *cert. denied*, 494 U.S. 1038 (1990).

nesses after his arrest,[9] or disposed of the victim's body in a manner that precluded its recovery.[10]

Nor has the state supreme court's refusal to articulate a limiting construction for factor (a) gone unnoticed by the state's prosecutors. To the contrary, prosecutors throughout the state have capitalized on the extraordinary breadth of factor (a) to argue that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

- Because the defendant struck many blows and inflicted multiple wounds,[11] or because the defendant killed with a single execution-style wound.[12]

- Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[13] or because the defendant killed the victim without any motive at all.[14]

- Because the defendant killed the victim in cold blood[15] or because the defendant killed the victim during a savage frenzy.[16]

- Because the defendant engaged in a cover up to conceal his crime,[17] or because the defendant did not engage in a cover up and so must have been proud of it.[18]

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[9] *People v. Hardy*, 2 Cal.4th 86, 204, 825 P.2d 781, 853, *cert. denied*, 113 S. Ct. 498 (1992).

[10] *People v. Bittaker*, 48 Cal.3d 1046, 1110 n.35, 774 P.2d 659, 697 n.35 (1989), *cert. denied*, 496 U.S. 931 (1990).

[11] *See, e.g., People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same).

[12] *See, e.g., People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-27 (same).

[13] *See, e.g., People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-69 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3543-44 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

[14] *See, e.g., People v. Edwards*, No. S004755, RT 10544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

[15] *See, e.g., People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

[16] *See, e.g., People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

[17] *See, e.g., People v. Stewart*, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

[18] *See, e.g., People v. Adcox*, No. S004558, RT 4607 (defendant freely informs others about crime); *People v. Williams*, No. S004365, RT 3030-31 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

- Because the defendant made the victim endure the terror of anticipating a violent death[19] **or** because the defendant killed instantly without any warning.[20]
- Because the victim had children,[21] **or** because the victim had not yet had a chance to have children.[22]
- Because the victim struggled prior to death,[23] **or** because the victim did not struggle.[24]
- Because the defendant had a prior relationship with the victim,[25] **or** because the victim was a complete stranger to the defendant.[26]

These examples show that absent any limitation on the "circumstances of the crime" aggravating factor, different prosecutors have urged juries to find this aggravating factor and place it on death's side of the scale based on squarely conflicting circumstances.

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[19] *See, e.g., People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11125; *People v. Hamilton*, No. S004363, RT 4623.

[20] *See, e.g., People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

[21] *See, e.g., People v. Zapien*, No. S004762, RT 37 (Jan. 23, 1987) (victim had children).

[22] *See, e.g., People v. Carpenter*, No. S004654, RT 16752 (victim had not yet had children).

[23] *See, e.g., People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

[24] *See, e.g., People v. Fauber*, No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

[25] *See, e.g., People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-67 (same); *People v. Kaurish*, 52 Cal.3d at 717, 802 P.2d at 316 (same).

[26] *See, e.g., People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

Of equal importance, prosecutors have been permitted to use the "circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

- *The age of the victim.* Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly;[27]
- *The method of killing.* Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[28]
- *The motive of the killing.* Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[29]

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[27] *See, e.g., People v. Deere*, No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10075 (victims were adolescents, ages 14, 15 and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16752 (victim was 20); *People v. Phillips*, 41 Cal.3d 29, 63, 711 P.2d 423, 444 (1985) (26-year-old victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-16 (victim was "elderly").

[28] *See, e.g., People v. Clair*, No. S004789, RT 2474-75 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an ax); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-87 (use of a club); *People v. Jackson*, No. S010723, RT 8075-76 (use of a gun); *People v. Reilly*, No. S004607, RT 14040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

[29] *See, e.g., People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-70 (same); *People v.*

- *The time of the killing.* Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[30]

- *The location of the killing.* Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park or in a remote location.[31]

The foregoing examples of how the factor (a) aggravating circumstance is actually being applied in practice make clear beyond peradventure that it is being relied upon as an aggravating factor in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts—or facts that are inevitable variations of every homicide—into an aggravating factor which the jury is urged to weigh on death's side of the scale. This is the precise type of arbitrariness which, as *Stringer* warns, is created by vague aggravating factors weighed in the sentencing process.

Belmontes, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-61 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10544 (no motive at all).

[30] *See, e.g., People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-04 (late at night); *People v. Lucero*, No. S012568, RT 4125-26 (middle of the day).

[31] *See, e.g., People v. Anderson*, No. S004385, RT 3167-68 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus*, No. S004723, RT 7340-41 (city park); *People v. Carpenter*, No. S004654, RT 16749-50 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

In practice, section 190.3's broad "circumstances of the crime" aggravating factor allows *precisely* what *Maynard* sought to preclude. It licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." *Maynard v. Cartwright*, 486 U.S. at 363. Thus, instructing the jury in the bare terms of section 190.3 violates the Eighth Amendment.

C. Allowing The Jury To Weigh The Aggravating Factor Of The Defendant's Age, As It Has Been Broadly Construed By The State Supreme Court, Violates The Eighth Amendment.

California Penal Code section 190.3(i) directs the jury to consider the "age of the defendant at the time of the crime." On its face, this statute gives the jury no guidance as to what age might constitute an aggravating factor, or what standards should be used in making this decision. Thus, on its face, this factor violates the Eighth Amendment's requirement that aggravating factors provide the sentencer with clear, specific guidance.

The state supreme court has not only failed to articulate a limiting construction of the age factor that would cure its vagueness, but it has articulated a definition of "age" that makes it as vague and standardless as it possibly could be. The California Supreme Court has not limited this factor to simple chronological age. Rather, it has interpreted this factor to be "a metonym for *any age-related matter* suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty." *People v. Lucky*, 45 Cal.3d 259, 302, 753 P.2d 1052, 1080 (1988), *cert. denied*, 488 U.S. 1034 (1989) (emphasis added).[32]

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[32] The state court has in fact held that factor (i) does not permit aggravation on the basis of "mere chronological age," *People v. Lucky*, 45 Cal.3d at 302, 753 P.2d at 1080; *People v. Rodriguez*, 42 Cal.3d 730, 789, 726 P.2d 113, 151 (1986), but it has never required that either this limitation on factor (i) or the court's expansive metonym construction of the factor be conveyed to California sentencing juries.

Once again, the state supreme court's unwillingness to articulate a limiting construction for this factor has not gone unnoticed by the state's prosecutors. Prosecutors throughout the state have capitalized on this failure, applying it exactly the way one would expect based on the state court's interpretation — inconsistently and arbitrarily. Thus, although a defendant cannot be subjected to the death penalty in California unless he was at least 18 years old at the time of the crime, in some cases prosecutors have argued that the age factor was aggravating where the defendant was in his late teens or early twenties at the time of the crime, while in other cases they have conceded that the defendant's youth was a mitigating factor. Prosecutors have argued that:

- Age 18 is an aggravating factor.[33]
- Age 19 is an aggravating factor.[34]
- Age 20 is a mitigating factor.[35]

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[33] *See, e.g., People v. Noguera*, No. S005170, RT 8640-41; *People v. Kimble*, No. S004364, RT 3348-51. But see *People v. Leach*, 41 Cal.3d 92, 111, 710 P.2d 893, 904 (1985) (California Supreme Court treats age 18 as a mitigating factor); *People v. Bell*, No. S004260, RT 1023 (prosecutor asserts that *had* defendant been 18 years old at the time of the crime it would be appropriate to treat age as a mitigating factor); *People v. Babbitt*, S22692, RT 5105 (same); *People v. Anderson*, No. S004385, RT 3156-57 (same); *People v. Kaurish*, No. S004640, RT 4562 (same); *People v. DeSantis*, No. S004706, RT 19840 (same); *People v. Fairbank*, No. S012032, RT 3610 (same); *People v. Ghent*, No. S004309, RT 2566 (same); *People v. Pinholster*, No. S004616, RT 7440 (same); *People v. Jennings*, 46 Cal.3d 963, 989, 760 P.2d 475, 491 (1988), *cert. denied*, 489 U.S. 1091 (1989) (same).

[34] *See, e.g., People v. Williams*, No. S004522, RT 1041; *People v. Avena*, No. S004422, RT 2611-12; *People v. Boyette*, No. S032736, RT 2007, 2014.

[35] *See, e.g., People v. Babbitt*, No. S22692, RT 5105; *People v. Carrera*, No. S004569, RT 173. *But see People v. Bean*, 46 Cal.3d at 952 n.18, 760 P.2d at 1017 n.18, No. S004387, RT 4718-19 (age 20 is aggravating).

- Age 21 is an aggravating factor.[36]
- Age 22 is an aggravating factor.[37]
- Age 24 is a mitigating factor.[38]

Even in the same case, the prosecutor and the trial judge have come to opposite conclusions about whether to treat the defendant's age as an aggravating factor, a mitigating factor, or neither:

- District attorney argued that age 19 was aggravating, but trial judge concluded that it was mitigating.[39]
- District attorney argued that age 19 was aggravating, but trial judge concluded that it was neutral.[40]
- District attorney argued that 21 could be either mitigating or aggravating, but trial judge concluded it was not mitigating.[41]

In practice, prosecutors and trial judges have applied the aggravating factor of age to defendants of virtually every age. They have applied it to defendants who were in their teens,[42]

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[36] *See, e.g., People v. Rundle*, No. S012943, RT 9450.

[37] *See, e.g., People v. Mitcham*, 1 Cal.4th 1027, 1076, 824 P.2d 1277, 1310, *cert. denied*, 113 S. Ct. 349 (1992), No. S004636, RT 1908.

[38] *See, e.g., People v. Raley*, No. S005870, RT 9293.

[39] *People v. Williams*, No. S004522, RT 1041, 1155.

[40] *People v. Avena*, No. S004422, RT 2611-12, 2750-51.

[41] *People v. Berryman*, No. S008182, RT 3992, Pronouncement of Judgment at 12.

[42] *See, e.g., People v. Williams*, No. S004522, RT 1041; *People v. Avena*, No. S004422, RT 2611-12; *People v. Boyette*, No. S032736, RT 2007, 2014.

twenties,[43] thirties,[44] forties,[45] and fifties[46] at the time of the crime. These examples demonstrate that, like the "circumstances of the crime," the "age of the defendant," in practice, is exactly the type of vague, illusory aggravating factor that, as *Stringer* warned, injects arbitrariness into the sentencing process.

III

BECAUSE THE CALIFORNIA SUPREME COURT HAS NOT REQUIRED THAT JURIES BE INSTRUCTED AS TO WHICH OF THE FACTORS CONTAINED IN PENAL CODE SECTION 190.3 ARE EXCLUSIVELY MITIGATING, THE ABSENCE OF STATUTORY MITIGATING FACTORS HAS BEEN USED TO CREATE ILLUSORY AGGRAVATING FACTORS.

Penal Code section 190.3 contains a single list of factors and does not designate which factors are aggravating and which are mitigating. The California Supreme Court, however, has made clear that some of the listed factors are intended to be exclusively

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[43] *See, e.g., People v. Bean*, 46 Cal.3d at 952, n.18, 760 P.2d at 1017 n.18, No. S004387, RT 4718-19 (age 20); *People v. Coleman*, 48 Cal.3d 112, 153-54, 768 P.2d 32, 55-56 (1989), *cert. denied*, 494 U.S. 1038 (1990) (age 22); *People v. Sandoval*, 4 Cal.4th 155, 189-90, 841 P.2d 862, 880 (1992), *cert. granted, in part*, 114 S. Ct. 40 (1993) (age 26).

[44] *See, e.g., People v. Gonzalez*, 51 Cal.3d 1179, 1233, 800 P.2d 1159, 1187 (1990), *cert. denied*, 112 S. Ct. 117 (1991) (age 31); *People v. Whitt*, 51 Cal.3d 620, 654, 798 P.2d 849, 869 (1990), *cert. denied*, 111 S. Ct. 2816 (1991) (age 30); *People v. Brown*, 46 Cal.3d 432, 455-56, 758 P.2d 1135, 1151 (1988), *cert. denied*, 489 U.S. 1059 (1989) (age 34); *People v. Edwards*, 54 Cal.3d 787, 844, 819 P.2d 436, 470 (1991), *cert. denied*, 113 S. Ct. 642 (1992) (age 37).

[45] *See, e.g., People v. McLain*, 46 Cal.3d 97, 111-12, 757 P.2d 569, 576-77 (1988), *cert. denied*, 489 U.S. 1072 (1989) (age 41).

[46] *See, e.g., People v. Douglas*, 50 Cal.3d 468, 538, 788 P.2d 640 (1990), *cert. denied*, 498 U.S. 1110 (1991). *See also People v. Nicolaus*, 54 Cal.3d 551, 587, 817 P.2d 893, 913 (1991), *cert. denied*, 112 S. Ct. 3040 (1992).

mitigating. *People v. Davenport*, 41 Cal.3d 247, 288-89, 710 P.2d 861, 888 (1985); *People v. Melton*, 44 Cal.3d 713, 770, 750 P.2d 741, 775, *cert. denied*, 488 U.S. 934 (1988); *People v. Lucero*, 44 Cal.3d 1006, 1031 n.15, 750 P.2d 1342, 1356-57 n.15 (1988); *People v. Hamilton*, 48 Cal.3d 1142, 1184, 774 P.2d 730, 755 (1989), *cert. denied*, 494 U.S. 1039 (1990). These factors are:

> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
>
> (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
>
> (g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.
>
> (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.
>
> (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.[47]

---

[47] Factors (d) through (h) and factor (j) of the California statute repeat almost verbatim the language of six of the factors listed in the Model Penal Code. *See* Model Penal Code §§ 210.6(b)-(g). The only significant difference is that the California statute added the confusing prefatory phrase "whether or not."

Some uncertainty has recently arisen as to factor (j). The state court had previously held that factor (j) (the defendant was a minor participant in the offense) was an exclusively mitigating factor. *See, e.g., Hamilton*, 48 Cal.3d at 1184, 774 P.2d at 755, and cases cited in *People v. Proctor*, 4 Cal.4th 499, 553, 842 P.2d 1100, 1132. But in *Proctor*, the court suggested that the defendant's sole participation in the offense

The state court has also made clear that the absence of these mitigating factors in a particular case is not to be considered an aggravating factor. As the court explained, the "purpose of 'aggravating' and 'mitigating' factors is to assess the seriousness of a capital crime in relation to others of the same general character." *People v. Rodriguez*, 42 Cal.3d 730, 788, 726 P.2d 113, 151 (1986). An aggravating circumstance is "a circumstance above and beyond the essential constituent of a crime which increases its guilt or enormity or adds to its injurious consequences." *People v. Davenport*, 41 Cal.3d at 289, 710 P.2d at 888. The absence of a mitigating factor is not a meaningful aggravating factor, because "the absence of mitigation would not automatically render the crime more offensive than any other murder of the same general character." *Id.*

Despite this recognition, the court has refused to require that juries be instructed that the exclusively mitigating factors are mitigating only,[48] or that these factors be deleted from the instructions when factually irrelevant.[49] The court has reasoned that "the aggravating or mitigating nature of these various factors

might be considered an aggravating factor under factor (j). *Id.*, 4 Cal.4th at 553, 842 P.2d at 1132. *See also, People v. Howard*, 1 Cal.4th 1132, 1195, 824 P.2d 1315, 1353, *cert. denied*, 113 S. Ct. 383 (1992).

[48] *See, e.g., People v. Raley*, 2 Cal.4th 870, 919, 830 P.2d 712, 744-45 (1992), *cert. denied*, 113 S. Ct. 1352 (1993); *People v. Jackson*, 28 Cal.3d 264, 316, 618 P.2d 149, 176 (1980), *cert. denied*, 450 U.S. 1035 (1981).

[49] *See, e.g., People v. Sims*, 5 Cal.4th 405, 465, 853 P.2d 992, 1029-30 (1993); *People v. Miranda*, 44 Cal.3d 57, 104-05, 744 P.2d 1127 (1987), *cert. denied*, 486 U.S. 1038 (1988); *People v. Ghent*, 43 Cal.3d 739, 776-77, 739 P.2d 1250, 1274 (1987), *cert. denied*, 485 U.S. 929 (1988).

Although not required to do so, trial judges have on occasion deleted statutory factors not raised by the evidence. This occurred at petitioner Tuilaepa's trial, where the jury was instructed on factors (a), (b), (c), (i) and (k) only (RT 885). In contrast, the jury at petitioner Proctor's trial was instructed on all of the factors contained in section 190.3, and the prosecutor argued that nine of the statutory factors — every factor except factors (b) (presence or absence of violent criminal activity) and

should be self-evident to any reasonable person within the context of each particular case." *People v. Jackson*, 28 Cal.3d at 316, 618 P.2d at 176. Accord, *People v. Zapien*, 4 Cal.4th 929, 990, 846 P.2d 704, 739, *cert. denied*, 114 S. Ct. 315 (1993). Notwithstanding the court's confidence, as a result of the lack of clarifying instructions prosecutors and trial judges in many cases have construed the absence of these mitigating factors as the presence of aggravating factors, permitting illusory aggravation to be weighed in favor of a death sentence.

The following examples are typical of the ways in which prosecutors have encouraged juries to use the absence of mitigating factors as aggravating factors, thereby distorting the weighing process and adding artificial weight to death's side of the scale:

- Illustrating the point with a homemade scale, the district attorney deemed all of the statutory factors to be aggravating, except for the absence of prior felony convictions, and assigned numerical values to each, resulting in a "score" of 22 aggravating points versus 3 mitigating points.[50]

- The district attorney argued that the circumstances of the crime was an aggravating factor, but the absence of prior violent acts was mitigating. He noted that the defendant's prior conviction for a felony was an insignificant aggravating factor. He then classified all the remaining factors except (k) as aggravating. He argued that there were two mitigating and nine aggravating factors. He prepared a chart listing these factors, which the jury took into the jury room. During deliberations, the jury requested a copy of the instructions on which "the chart prepared by the District Attorney was prepared."[51]

Prosecutors have included the absence of statutory mitigating factors in their pretrial notices of aggravation filed with the court

(i) (petitioner's age) — were aggravating factors (RT 1476-81, 1532-34).

[50] *People v. Gonzalez*, 51 Cal.3d at 1233-34, 800 P.2d at 1188.

[51] *People v. Hamilton*, 48 Cal.3d at 1190, 774 P.2d at 759 (Broussard, J., concurring and dissenting).

and served on the defense,[52] and in closing argument have characterized factors (d),[53] (e),[54] (f),[55] (g),[56] (h),[57] and even factor (k),[58] as factors in aggravation, both before and after the state court's decisions construing those factors as mitigating only.

Even in the absence of such prosecutorial arguments, there is no reason to believe that without judicial guidance jurors will correctly interpret the factors. As the state court has recognized, the wording of the statute—and of the instruction patterned upon it—is ambiguous. The use of the phrase "whether or not" is susceptible to the interpretation that the absence of a mitigating factor has some aggravating significance. *People v. Davenport*, 41 Cal.3d at 289, 710 P.2d at 888. Thus the practice of instructing

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[52] *See, e.g., People v. Beardslee*, 53 Cal.3d 68, 112, 806 P.2d 1311, 1336, *cert. denied*, 112 S. Ct. 449 (1991).

[53] *See, e.g., People v. Gonzalez*, 51 Cal.3d at 1233-34, 800 P.2d at 1187-88; *People v. Allison*, 48 Cal.3d 879, 901-02, 771 P.2d. 1294, 1310-11 (1989), *cert. denied*, 494 U.S. 1090 (1990); *People v. Davenport*, 41 Cal.3d at 288-89, 710 P.2d at 888.

[54] *See, e.g., People v. Kelly*, 1 Cal.4th 495, 548-49, 822 P.2d 385, 416 (1992), *cert. denied*, 113 S. Ct. 232 (1992); *People v. Gallego*, 52 Cal.3d 115, 200, 802 P.2d 169, 214 (1990), *cert. denied*, 112 S. Ct. 337 (1991); *People v. Gonzalez*, 51 Cal.3d at 1233-34, 800 P.2d at 1187-88; *People v. Lucero*, 44 Cal.3d at 1031 n.15, 750 P.2d at 1356-57 n.15.

[55] *See, e.g., People v. Kelly*, 1 Cal.4th at 548-49, 822 P.2d at 416; *People v. Gallego*, 52 Cal.3d at 200, 802 P.2d at 214; *People v. Lucero*, 44 Cal.3d at 1031 n.15, 750 P.2d at 1356-57 n.15.

[56] *See, e.g., People v. Montiel*, 5 Cal.4th 877, 936, 855 P.2d 1277, 1311 (1993); *People v. Allison*, 48 Cal.3d at 902, 771 P.2d at 1310; *People v. Davenport*, 41 Cal.3d at 288-89, 710 P.2d at 888.

[57] *See, e.g., People v. Gonzalez*, 51 Cal.3d at 1233-34, 800 P.2d at 1187-88; *People v. Davenport*, 41 Cal.3d at 288-89, 710 P.2d at 888.

[58] *People v. Brown*, 46 Cal.3d at 455, n. 10, 758 P.2d at 1150 n.10: "In his summation, the prosecutor told the jury that 'each of those factors'—apparently, even the alleged *absence* of mitigating evidence under factor (k) ('Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime')—'is an aggravating factor . . .' " (emphasis in original).

on the statutory mitigators, even when they are factually irrelevant, invites the jury to aggravate upon the basis of non-existent factors. Cf. *McCleskey v. Kemp*, 481 U.S. 279, 314 n.37 (1987) (recognizing that "[i]t would be improper and often prejudicial to allow jurors to speculate as to aggravating circumstances wholly without support in the evidence"). Indeed, even trial judges, who are more skilled than jurors at interpreting the law, have, in a number of cases, assigned aggravating weight to the absence of mitigating factors.[59]

An aggravating factor that is based on the absence of one of California's enumerated mitigating factors is the quintessence of an illusory aggravating factor. The California court itself has recognized that some of the factors, including factor (e), victim participation, and factor (f), moral justification, are so unusual that to allow the absence of these factors to be considered aggravating factors is to make them automatically applicable to most murderers. *People v. Davenport*, 41 Cal.3d at 289, 710 P.2d at 888. Those factors that may occur somewhat more frequently, such as minor participation, duress, or extreme mental disturbance, nevertheless still exist in only a small minority of cases. An aggravating factor that exists in nearly every capital case fails to fulfill its purpose, which is to guide the jury in distinguishing "those who deserve capital punishment from those who do not." *Arave v. Creech*, 507 U.S. ____, 113 S. Ct. 1534, 1542 (1993).

A sentencing process that allows the jury to weigh aggravating factors based on the absence of mitigating factors creates both of the risks that *Stringer* recognized violate the Eighth Amendment. Because such a process creates aggravating factors that do not

---

[59] *See, e.g., People v. Kaurish*, 52 Cal.3d at 717, 802 P.2d at 316 (trial judge concluded that factor (h) was aggravating because the defendant had the capacity to appreciate the criminality of his conduct and was not impaired by intoxication); *People v. Hamilton*, 48 Cal.3d at 1186, 774 P.2d at 757 (trial court concluded that one factor, the absence of prior violent criminal activity, was mitigating, and that the remaining 10 factors, including factor (k), were aggravating); *People v. Brown*, 46 Cal.3d at 462, 758 P.2d at 1155.

rationally make the defendant more deserving of death, it "creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." *Stringer v. Black*, 503 U.S. ____, 112 S. Ct. 1130, 1139 (1992). Because such a process artificially inflates the number of aggravating factors the jury weighs, it "creates the possibility not only of randomness but of bias in favor of death." Id.[60]

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[60] The jury's consideration of the *absence* of "extreme" mental or emotional disturbance, "extreme" duress or the "substantial" domination of another person (Cal. Penal Code §§ 190.3(d) and (g) (Deering 1994)) as an aggravating factor is unacceptable under the Eighth Amendment for an additional reason. The text of these factors requires the jury to make an inherently amorphous determination regarding the degree of disturbance and domination. Aggravating factors that include terms like "extreme" and "substantial" do not provide sufficient guidance to avoid arbitrary and capricious sentencing. See, e.g., *State v. David*, 468 So.2d 1126, 1129-30 (La. 1984), *cert. denied*, 476 U.S. 1130 (1986) (holding vague an aggravating factor which allowed the jury to impose death based upon a "significant" history of criminal conduct); *State v. White*, 395 A.2d 1082 (Del. 1978) (holding vague an aggravating factor in which the victim was defined as "elderly" or "defenseless"); *Arnold v. State*, 224 S.E.2d 386, 391-92 (Ga. 1976) (holding vague an aggravating factor which allowed the jury to impose death based upon a "substantial" history of assaultive convictions).

CONCLUSION

For the foregoing reasons, the judgments of the California Supreme Court affirming petitioners' death sentences should be reversed.

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Respectfully submitted,

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Nos. 93-5131 and 93-5161

IN THE

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OCTOBER TERM, 1993

PAUL PALALAUA TUILAEPA, *Petitioner*,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*,

---- AND ----

WILLIAM PROCTOR, *Petitioner*,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*.

On Writs of Certiorari to the Supreme Court of the State of California

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

In *California* v. *Ramos*, this Court made the following holding: "Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty . . . the jury is then free to consider a *myriad of factors* to determine whether death is the appropriate punishment."

The question presented is whether *Stringer* v. *Black* overruled this holding.

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Jurek v. Texas, 428 U. S. 262, 49 L. Ed. 2d 929,
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Lewis v. Jeffers, 497 U. S. 764, 111 L. Ed. 2d 606,
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Webster v. Fall, 266 U. S. 507, 69 L. Ed. 411,
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Woodson v. North Carolina, 428 U. S. 280,
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California Jury Instructions, Criminal
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Klein & Rolph, Relationship of Offender and Victim Race to
Death Penalty Sentences in California,
32 Jurimetrics J. 33 (1991) 25, 26

Maitland & Montague, A Sketch of English Legal History
(Colby ed. 1915) 15

Metzner, Anatomy of an Upset: The Supreme Court's
Shocker on Habeas Retroactivity,
28 Crim. L. Bull. 521 (1992) 28

U. S. Bureau of Justice Statistics,
Capital Punishment 1991 27

J. Wilson, Thinking About Crime (1976) 15

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---- AND ----

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THE PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit corporation formed to advance the interests of victims of crime and the law-abiding public in the criminal justice system. Defendants' efforts to overturn the use of aggravating factors that have been used for 17 years in California is contrary to the interests CJLF was formed to protect.

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1. All parties have consented in writing to the filing of this brief.

SUMMARY OF FACTS AND CASE

In April of 1982, defendant Proctor tortured, raped, and murdered Bonita Stendall, a 55-year-old, widowed first grade teacher. Proctor J. A. 96. At his second penalty trial the next year, the jury was instructed to base its verdict on whether the aggravating circumstances "outweigh" any mitigating. *Id.*, at 79. Included in the aggravating circumstances were the circumstances of the crime (to the extent they are aggravating), prior violent crimes, and prior conviction of felonies. *Id.*, at 77.

In October of 1986, defendant Tuilaepa entered a bar during Monday night football. He robbed the bartender, robbed the patrons, shot and killed patron Melvin Whiddon, and shot and wounded three other patrons. Tuilaepa fired the last shot while exiting the bar and smiled before shooting. Tuilaepa J. A. 69-71.

Because Tuilaepa's case was tried after *People* v. *Brown*, 40 Cal. 3d 512, 541, 709 P. 2d 440, 456 (1985), his jury received a different instruction from that given Proctor's jury. "In weighing the various circumstances, you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances." Tuilaepa J. A. 63. The jury was instructed, as in *Proctor*, to consider circumstances of the crime, prior violent crimes, and prior felony convictions. *Id.*, at 60-61.

Both defendants were sentenced to death, and both sentences were upheld. *People* v. *Proctor*, 4 Cal. 4th 499, 842 P. 2d 1100 (1992); *People* v. *Tuilaepa*, 4 Cal. 4th 569, 842 P. 2d 1142 (1992).

SUMMARY OF ARGUMENT

This case should not be decided on the simplistic basis of whether California is or was a "weighing state." Instead, the California system and the manner in which it considers aggravating circumstances must be examined on an individual basis.

Over many years and many cases, this Court has repeatedly distinguished between the circumstances used to narrow the

death-eligible class and those used to select the proper sentence for defendants within that class. The eligibility factors must provide clear and objective guidance. However, in *California* v. *Ramos* this Court held, while considering the very statute at issue here, that consideration of "a myriad of factors" in the final selection phase was not only permissible but desirable, and that a lack of concrete guidance "presents no constitutional problem."

The problem of racial prejudice provides no ground to strike down the California system. California's middle-of-the-road approach to aggravating circumstances is at least equal to, if not superior to, other approved approaches.

California's system has survived 17 years of the most intense litigation in history, including four reviews by this Court. To strike it down now "would be nothing less than a breach of faith."

ARGUMENT

In *Zant* v. *Stephens*, 462 U. S. 862, 878 (1983), this Court drew a sharp distinction between circumstances used to narrow the death-eligible class and those used "in the process of selecting, from among that class, those defendants who will actually be sentenced to death." While the specificity requirement of *Godfrey* v. *Georgia*, 446 U. S. 420 (1980) applies to the eligibility circumstances, "the Constitution does *not* require the jury to ignore other possible aggravating factors" in the selection step. *Stephens*, 462 U. S., at 878 (emphasis added).

In *California* v. *Ramos*, 463 U. S. 992, 1008 (1983), this Court emphatically repeated this distinction, quoted the *Stephens* principle, and applied it to the very statute at issue in the present case. Defendants' position that the *Godfrey* standard of specificity applies to California's selection circumstances cannot be reconciled with *Ramos*. Their position, then, boils down to a contention that *Stringer* v. *Black*, 117 L. Ed. 2d 367, 112 S. Ct. 1130 (1992) overruled *Ramos*, even while denying it was creating or applying any new rules. That cannot be correct.

I. The label "weighing state" is simplistic and should be abandoned.

A. The Tyranny of Labels.

"A fertile source of perversion in constitutional theory is the tyranny of labels." *Snyder* v. *Massachusetts*, 291 U. S. 97, 114 (1934). Justice Cardozo's wise admonition rings especially true in the present case.

In the past few years, this Court's opinions in this area have scrutinized the standard by which the sentencer makes the final decision, to determine whether the sentencer "weighs." See, *e.g.*, *Richmond* v. *Lewis*, 121 L. Ed. 2d 411, 421, 113 S. Ct. 528, 534-535 (1992). This distinction, *amicus* submits, is a mirage. The unvarnished truth is that *all* sentencers "weigh."

The *Richmond* Court, analyzing the standard used for the final sentencing decision in Arizona, said this. "Read most naturally, [the statute] requires the sentencer to weigh aggravating and mitigating circumstances—to determine the relative 'substan[ce]' of the two kinds of factors." *Id.*, 121 L. Ed. 2d, at 421, 113 S. Ct., at 535. That is quite true, but is it any less true of the instruction in *Zant* v. *Stephens*?

Stephens' jury was instructed that it "shall consider any mitigating circumstances or aggravating circumstances authorized by law."[2] How can jurors comply with this instruction without "weighing" the aggravating and mitigating against each other? Mitigating circumstances, by definition, are those proffered as a basis for a sentence less than death. See, *e.g.*, *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion). Aggravating circumstances are necessarily the opposite. A decision process which considers them both necessarily involves a consideration of their relative moral force, *i.e.* "weighing."

The *Stephens* Court implicitly recognizes that Georgia juries *do* "weigh." In the course of rejecting the argument that a vague eligibility factor had poisoned the sentencing decision, the *Stephens* Court says "That label [statutory aggravating circumstance] arguably might have caused the jury to give somewhat greater *weight* to respondent's prior criminal record than it

2. The full instruction is reproduced in the Appendix.

otherwise would have given." *Zant* v. *Stephens*, *supra*, 462 U. S., at 888 (emphasis added); see also *id.*, at 880 (referring to Georgia jury's "weighing").

People v. *Brown*, 40 Cal. 3d 512, 541, 709 P. 2d 440, 456 (1985), rev'd on other grounds *sub nom. California* v. *Brown*, 479 U. S. 538 (1987), explained the nature of the decision process under California law.

> "[T]he word 'weighing' is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary 'scale,' or the arbitrary assignment of 'weights' to any of them. . . . Thus the jury, by weighing the various factors, *simply determines under the relevant evidence which penalty is appropriate in the particular case*." *Ibid.* (emphasis added).

Only by straining logic to the breaking point could one contend that there is a difference of constitutional magnitude between a direction to "weigh" aggravating and mitigating circumstances, as that term is used in *Brown*, and a direction to "consider" aggravating and mitigating circumstances such as the one in *Zant* v. *Stephens*. There are differences between the various states' sentencing systems, to be sure, but the difference does not lie in a distinction between "weigh" and "consider." So long as the sentencer has discretion and considers mitigating factors, which the Eighth Amendment has been construed to require, see *Sumner* v. *Shuman*, 483 U. S. 66, 73-76 (1987) (summarizing cases), *all sentencers "weigh."*

In the past, this Court has resisted the temptation to oversimplify and overclassify death penalty statutes. "We take statutes as we find them . . . . '[E]ach distinct system must be examined on an individual basis.' " *Pulley* v. *Harris*, 465 U. S. 37, 45 (1984), quoting *Gregg* v. *Georgia*, 428 U. S. 153, 195 (1976). It would be a fundamental error, *amicus* submits, to simply decide whether California is to be labelled a "weighing state" and then mechanically apply the standard of *Godfrey* v. *Georgia*, 446 U. S. 420 (1980) and *Maynard* v. *Cartwright*, 486 U. S. 356 (1988) to California's "aggravating" circumstances as a

result of that labelling. Instead, California's system must be "examined on an individual basis" to determine the proper rule.

B. Variation in Death Penalty Statutes.

There is considerable variation in state capital sentencing systems. They do not neatly fit into two pigeonholes labelled "weighing" and "nonweighing." To illustrate, we will look briefly at the four states with the largest numbers of capital cases: Texas, Georgia, Florida, and California.

The Texas system has a narrowed definition of capital murder. Aggravating and mitigating circumstances are considered indirectly as they relate to the statutory "special issues" of deliberation and future dangerousness. *Jurek* v. *Texas*, 428 U. S. 262, 272-273 (1976) (lead opinion). The future dangerousness inquiry is a broad one, sweeping in a wide variety of information about the defendant. *Ibid*. *Jurek* upheld the system against a vagueness attack on future dangerousness, *id.*, at 275-276, and this Court reaffirmed the validity of the broad inquiry in *Barefoot* v. *Estelle*, 463 U. S. 880, 896-897 (1983).

The Georgia system narrows the death-eligible class with statutory aggravating circumstances, one of which must be found true by the jury. From that point on, however, the jury is not limited to the statutory list and may consider *any* circumstances in aggravation or mitigation. *Zant* v. *Stephens*, *supra*, 462 U. S., at 871. However, the jury is explicitly instructed to consider the statutory aggravating circumstances, along with any others it deems relevant, in arriving at the final determination. See Appendix. The jury is told to "consider" aggravating and mitigating circumstances, but is not told to "weigh" them. *Ibid.*

Stephens and *Gregg* v. *Georgia*, 428 U. S. 153 (1976) held that the jury's consideration of unlimited aggravating circumstances at this final decision stage is not merely permissible, it is preferable. "We think the Georgia court *wisely* has chosen not to impose *unnecessary* restrictions . . . ." *Stephens*, *supra*, 462 U. S., at 886, quoting *Gregg* (emphasis added).

This expansion of aggravating factors in the final sentencing decision, beyond those considered for eligibility, was the basis of *Zant* v. *Stephens*. The fact that Stephens' jury should not have been instructed on his criminal record as an eligibility

circumstance did not render erroneous their consideration of that record in the final sentencing decision. 462 U. S., at 888.

In Florida, as in Georgia, the death-eligible class is narrowed by the requirement that at least one in a list of aggravating circumstances must be found true. *Barclay* v. *Florida*, 463 U. S. 939, 954 (1983) (plurality). Unlike Georgia, however, the prosecution's case for a sentence of death is limited to that *same* list of factors. *Ibid*. The jury is instructed to "weigh" the aggravating against any mitigating. *Id.*, at 953.

This structure creates a linkage between the eligibility findings and the final sentencing decision. A factor not found for eligibility does not belong on "death's side of the scale." See *Stringer* v. *Black*, 117 L. Ed. 2d 367, 379, 112 S. Ct. 1130, 1137 (1992) (discussing similar Mississippi system, see *post*, at 18). A factor erroneously found for eligibility is thus wrongly on "death's side of the scale." This is different from Georgia, where an eligibility factor which is erroneous only for vagueness is nonetheless properly considered in the last step.

Where multiple eligibility factors are found true, an error in only one is necessarily harmless error as to eligibility. However, in Florida-type systems, that same error may result in a factor being considered in the balance that should not have been there. That damage can be repaired only by a determination that the error was harmless or by a new "weighing." *Ibid*. When the *Stephens* Court noted that its holding would not necessarily apply in all states, it cited three states, all of which limit aggravation in the final selection stage to the same circumstances used for eligibility. See *Stephens*, *supra*, 462 U. S., at 873-874, n. 12, and statutes there cited.

All of this Court's recent opinions on vague "aggravating" circumstances have involved Florida-type systems. That is, the sentencer must explicitly find at least one circumstance in the statutory list true for the defendant to be *eligible* for the death penalty. Furthermore, in each case the aggravating side of the "weighing" process has been limited by state law to the eligibility circumstances found true. *Parker* v. *Dugger*, 498 U. S. 308 (1991) (Florida); *Stringer*, *supra*; *Sochor* v. *Florida*, 119 L. Ed. 2d 326, 112 S. Ct. 2114 (1992); *Espinoza* v. *Florida*, 120 L. Ed. 2d 854, 112 S. Ct. 2926 (1992); *Richmond* v. *Lewis*,

121 L. Ed. 2d 411, 113 S. Ct. 528 (1992) (Arizona); see *Walton* v. *Arizona*, 497 U. S. 639, 643-644 (1990) (describing Arizona system). In each of these cases, there was *Godfrey* error because an *eligibility* circumstance was vague. With the possible exception of *Stringer*, discussed further below, these cases dealt only with the question of when *Godfrey* error is harmless, and not with any independent specificity requirement in the selection stage.

Arave v. *Creech* 123 L. Ed. 2d 188, 113 S. Ct. 1534 (1993) did not deal with the selection stage at all, because Idaho chose to take its stand on the position that its factor was valid for eligibility under *Godfrey*. See *id.*, 123 L. Ed. 2d, at 197, 113 S. Ct., at 1540 (certiorari granted, limited to "narrow question"). Defendant Proctor's attempt to infer a holding from the presence of additional factors in *Creech*, Brief for Petitioner 15, is incorrect. Cases are not authority for propositions not considered. See *Webster* v. *Fall*, 266 U. S. 507, 511 (1925).

California's law has gone through three phases. There is the 1977 statute upheld in *Pulley* v. *Harris*, *supra*; the 1978 initiative as literally written, considered in *California* v. *Ramos*, 463 U. S. 992 (1983) and *Boyde* v. *California*, 494 U. S. 370 (1990); and the statute as judicially modified in *People* v. *Brown*, 40 Cal. 3d 512, 541, 709 P. 2d 440, 456 (1985), rev'd on other grounds *sub nom. California* v. *Brown*, 479 U. S. 538 (1987). See *Boyde*, 494 U. S., at 374-375, n. 3 (summarizing change made by *Brown*).

The 1977 law directed the jury to "take into account and be guided by the aggravating and mitigating circumstances," but did not use the word "weigh." See *Harris*, *supra*, 465 U. S., at 52. The 1978 statute, as written, requires the jury to "weigh" and to sentence the defendant to death if the aggravating outweighs the mitigating. Cal. Penal Code § 190.3; Proctor J. A. 79. However, to avoid the perceived constitutional problem ultimately dismissed in *Boyde*, the California Supreme Court construed this feature out of the statute in *Brown*, *supra*, 40 Cal. 3d, at 539-541, 709 P. 2d., at 454-456. Juries are now instructed to consider the circumstances and determine the appropriate penalty. California Jury Instructions, Criminal § 8.88 (5th ed., Supp. 1994); Tuilaepa J. A. 63.

Throughout this evolution, though, the California system has had a feature that makes it different from either the Georgia or Florida systems. There are two *different* lists of aggravating circumstances. For narrowing the death-eligible class, the jury must find a "special" circumstance. For the final sentencing decision, the jury may consider in aggravation not only the special circumstances previously found but also any circumstances of the offense deemed aggravating, any prior felonies, and any prior crimes of violence. Cal. Penal Code § 190.3(a), (b) and (c).[3] In other words, the only relevant items of aggravating evidence excluded are nonviolent misdemeanors and general, noncriminal "bad character" evidence. As in Georgia, this breadth of aggravating circumstances is not only permissible, it is preferable. See *California* v. *Ramos*, 463 U. S. 992, 1008 and n. 22 (1983).

In summary, then, California's system is not entirely like Georgia's, Florida's, or Texas's. Like Texas, and unlike Georgia and Florida, eligibility for capital punishment is determined by findings in the guilt phase and not in the penalty phase. Like Georgia, and unlike Florida, the penalty decision is open on the aggravating side to broad factors, and not limited to a few specific factors. However, like Florida and Texas, and unlike Georgia, the jury is not given a completely free rein to consider any factors it wants.

This variety in statutes defies simplistic pigeonholing as "weighing" or "nonweighing." It is time, *amicus* submits, to abandon the simplistic approach and return to the original wisdom of examining each system individually.

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3. The statute also lists "age" which, where it is applicable, is usually a mitigating factor. See, *e.g.*, *Johnson* v. *Texas*, 125 L. Ed. 2d 290, 311-312, 113 S. Ct. 2658, 2673 (1993) (O'Connor, J., dissenting). While it is possible for age to be aggravating, see *ibid.*; *People* v. *Sandoval*, 4 Cal. 4th 155, 189, 841 P. 2d 862, 880 (1992), cert. granted limited to other grounds *Sandoval* v. *California*, No. 92-9049 (Sept. 28, 1993), these cases do not present that issue. The prosecutor in *Proctor* explicitly told the jury that age was mitigating, Proctor J. A. 27-28, while the prosecutor in *Tuilaepa* merely argued that under the circumstances of the case age was not mitigating. Tuilaepa J. A. 11-14.

II. Broad aggravating circumstances are a highly desirable part of individualized sentencing.

Defendant Tuilaepa maintains that "In the years since *Godfrey*, the Court has never suggested that the approach used in *Godfrey* to evaluate the propriety of aggravating factors is somehow limited to schemes which, like Georgia, limit the use of aggravating factors to determining whether a defendant is eligible for the death penalty." Brief for Petitioner Tuilaepa 13. If counsel for Tuilaepa means this statement to imply that this Court has never limited *Godfrey* to eligibility circumstances, then he is quite wrong. This Court has recognized such a distinction repeatedly. One of these cases dealt with the very statute at issue in the present case.

A. California v. Ramos.

California v. *Ramos*, 463 U. S. 992 (1983) involved a paragraph of California Penal Code section 190.3 known as the "Briggs Instruction," which required that the jury be informed of the possibility of commutation of life-without-parole sentence. The California Supreme Court had held in its decision in *Ramos* that the instruction invites the jury "to *consider* the commutation power in its sentencing determination," and this Court proceeded with its analysis on that basis. *Id.*, at 998, n. 8 (emphasis in original). This Court then rejected Ramos's vagueness attack on the future dangerousness determination inherent in this consideration.

The *Ramos* Court's rejection of this attack was based in part on a comparison of California's system with the one approved in *Jurek* v. *Texas*, 428 U. S. 262 (1976). *Ramos*, *supra*, 463 U. S., at 1001-1002. In Texas, as in California, there is a clear separation between the death-eligibility criteria and the factors used for selection from the eligible class. *Id.*, at 1000, n. 11, 1002. The Texas offense of "capital murder" corresponds to the California verdict of murder in the first degree with special circumstances. Compare *Jurek*, *supra*, 428 U. S., at 268 with Cal. Penal Code §§ 189, 190.2.

If "future dangerousness" were subjected to the *Godfrey* test of specificity, it would surely fail. Just as virtually all murders are "vile," cf. *Godfrey* v. *Georgia*, 446 U. S. 420, 428-429

(1980) (plurality), so virtually all murderers are "dangerous." Vileness and dangerousness are both relative terms as applied to murders and murderers, respectively. When the jury makes one of these determinations, it is not finding a fact to be objectively true or false; it is placing the crime or the criminal on a continuum, relative to other crimes and criminals. In *Godfrey*, the lack of any objective milestones on this continuum was a constitutional defect, lacking any "principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." 446 U. S., at 433; see also *People* v. *Superior Court* (*Engert*), 31 Cal. 3d 797, 806, 647 P. 2d 76, 81 (1982). In *Jurek*, the lack of objective milestones on the continuum of dangerousness was not a defect, and the Court explicitly rejected the vagueness challenge. 428 U. S., at 274-276. The difference is that *Godfrey* involves an eligibility criterion and *Jurek* and *Ramos* do not.

Ramos does not end with the *Jurek* discussion, however. The *Ramos* Court goes on to discuss the nature of the sentencing decision, relying heavily and explicitly on *Zant* v. *Stephens*, 462 U. S. 862 (1983):

> "In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In fixing a penalty, however, there is no similar 'central issue' from which the jury's attention may be diverted.[21] *Once the jury finds that the defendant* falls within the legislatively defined category of persons *eligible* for the death penalty, as did respondent's jury in determining the truth of the alleged special circumstance, *the jury then is free to consider a myriad of factors* to determine whether death is the appropriate punishment. In this sense, the jury's choice between life and death must be individualized. 'But *the Constitution does not require the jury to ignore other possible . . . factors* in the process of selecting . . . those defendants who will actually be sentenced to death.' *Zant* v. *Stephens*, 462 U.S. 862, 878 (1983) (footnote omitted). As we have noted, the essential effect of the Briggs Instruction is to inject into the sentencing calculus a consideration akin to the aggravating factor of future dangerousness in the Texas scheme. See *supra* at 1003. This element '*is simply one of the countless consider-*

ations weighed by the jury in seeking to judge the punishment appropriate to the individual defendant.' 462 U.S., at 900 (Rehnquist, J., concurring in the judgment).[22]

"[21] '[S]entencing decisions rest on a far-reaching inquiry into *countless facts and circumstances* and not on the type of proof of particular elements that returning a conviction does.' *Zant* v. *Stephens*, 462 U.S., at 902 (Rehnquist, J., concurring in judgment).

"[22] Consideration of the commutation power does not undermine the jury's statutory responsibility to weigh aggravating factors against mitigating factors and impose death only if the former outweigh the latter. *The desirability of the defendant's release into society is simply one matter that enters into the weighing process*. Moreover, the fact that the jury is given *no specific guidance* on how the commutation factor is to figure into its determination *presents no constitutional problem*. As we held in *Zant* v. *Stephens*, *supra*, the constitutional prohibition on arbitrary and capricious capital sentencing determinations is not violated by a capital sentencing 'scheme that permits the jury to exercise unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty by statute.' *Id.*, at 875." *Ramos*, *supra*, 463 U. S., at 1008 (emphasis added).

Thus, this Court has quite explicitly held that the sentence selection process of California Penal Code section 190.3 is *not* governed by the same strict specificity requirements as the death eligibility determination. Moreover, as footnote 22 makes clear, the *Ramos* Court did so while very much aware that section 190.3 as written and as then construed called for a "weighing" process and that the factor before the Court was "one matter that enters into the weighing process."

After *Ramos* and before *Stringer* v. *Black*, 117 L. Ed. 2d 367, 112 S. Ct. 1130 (1992), *amicus* would have considered this point so thoroughly established that it would only require a bare citation, not a major section of a brief. Regrettably, some language in the *Stringer* opinion has muddied the previously clear waters to the point that an unequivocal reassertion of the

Ramos principle is necessary. To show why *Ramos* was right, we go back to the beginning.

B. Narrowing: Necessary for Rationalization.

In *Furman* v. *Georgia*, 408 U. S. 238 (1972), this Court struck down the existing system of unfettered discretion in capital sentencing, effectively overruling the clear holding of *McGautha* v. *California*, 402 U. S. 183, 207 (1971). In sharp contrast to Justice Harlan's careful, thorough, scholarly opinion for a solid majority in *McGautha*, none of the five Justices voting to reverse in *Furman* joined any of the others' opinions. Cf. *Douglas* v. *Jeannette*, 319 U. S. 157, 182 (1943) (Jackson, J., concurring in the judgment) (duty to explain basis).

Notwithstanding this fracture, it is clear enough what motivated a majority of the Court to make the dramatic about-face that it did. Pre-*Furman* death penalty law provided far too much leeway for racial discrimination. See *Graham* v. *Collins*, 122 L. Ed. 2d 260, 277-280, 113 S. Ct. 892, 904-906 (1993) (Thomas, J., concurring); *id.*, 122 L. Ed. 2d, at 292, 113 S. Ct., at 915 (Stevens, J., dissenting).

The evil exposed in *Furman* was the result of two concurrent causes: the breadth of offenses for which death was an available punishment and the lack of guidance for selecting those actually sentenced to death from the eligible offenders. See *Walton* v. *Arizona*, 497 U. S. 639, 715 (1990) (Stevens, J., dissenting); *Gregg* v. *Georgia*, 428 U. S. 153, 206-207 (1976) (lead opinion). To address this problem, the post-*Furman* statutes all have some form of "narrowing" for the crime of murder, and this Court has several times referred to narrowing as a constitutional requirement. See *Zant* v. *Stephens*, 462 U. S. 862, 877 (1983); *Lowenfield* v. *Phelps*, 484 U. S. 231, 244 (1988).

For the most part, the identification of factors which separate the death-eligible defendants from the others is a matter for legislative and not judicial decision. See *Gregg*, *supra*, 428 U. S., at 192. The one major limitation on eligibility factors is tightly bound to the purpose of those factors. That is, "aggravating circumstances must be construed to permit the sentencer to make a principled distinction between those who deserve the death penalty and those who do not." *Lewis* v. *Jeffers*, 497

U. S. 764, 776 (1990). The *Jeffers* Court left no ambiguity concerning what it meant by "aggravating circumstances"—"those circumstances that make a criminal defendant '*eligible*' for the death penalty . . . ." *Id.*, at 774 (emphasis added); see also *Graham* v. *Collins*, 122 L. Ed. 2d 260, 300, 113 S. Ct. 892, 922 (1993) (Souter, J., dissenting) ("specific and detailed guidance" requirement is for eligibility); *Stephens*, *supra*, 462 U. S., at 886.

Because eligibility turns on a "yes or no" answer to a question, that question must be one which is susceptible to such an answer. Because all murders are heinous, asking a jury whether the murder is "especially heinous" fails to provide a principled distinction. See *Maynard* v. *Cartwright*, 486 U. S. 356, 364 (1988). For eligibility circumstances to work properly, the jury must be asked to find a fact true or false, and not simply to place the crime on an unmarked continuum of heinousness, with no clue as to where the line is drawn between "especially heinous" and "ordinarily heinous."

Narrowing the eligible class requires a factual determination, but the fact need not be externally visible or mathematically precise. The defendant's state of mind can be a valid eligibility circumstance, since state of mind is a factual determination, albeit a difficult one. *Arave* v. *Creech*, 123 L. Ed. 2d 188, 199, 113 S. Ct. 1534, 1541-1542 (1993).

C. Mitigation: Necessary for Individualization.

The most obvious answer to the *Furman* problem of arbitrariness and discrimination would appear to be mandatory sentencing. However, *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) struck down mandatory sentencing. The *Woodson* plurality gave three reasons for this holding: collective legislative judgment, *id.*, at 298-299, the inevitable widespread nullification of a sweeping, mandatory death penalty for first-degree murder, *id.*, at 291-296, and a newly created constitutional imperative of individualized sentencing, *id.*, at 303-305.

The nullification point is far and away the strongest support for the *Woodson* rule. If the system has no formal outlet for the extension of mercy in appropriate cases, the operators of the system will find informal ways. This went on for centuries in

England, from the faking of reading tests for "benefit of clergy," see Maitland & Montague, A Sketch of English Legal History 72-73 (Colby ed. 1915), to bogus insanity verdicts, which dropped sharply upon the abolition of capital punishment, see J. Wilson, Thinking About Crime 187 (1976). Justice and equality are better served by keeping the inevitable mercy decision out in the open and permitting the state to structure it. *Woodson*, *supra*, 428 U. S., at 303.

The final choice between life imprisonment and death is fundamentally different from the eligibility determination. See *Ramos* quote, *ante*, at 11-12; *Sawyer* v. *Whitley*, 120 L. Ed. 2d 269, 282, 112 S. Ct. 2514, 2520-2521 (1992). While the Constitution requires the eligibility determination to be based on legislatively specified facts, the Constitution has been construed to require that the sentencer be permitted to consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion).

There are two possible justifications for the *Lockett* rule. One is a naked desire to reduce the number of death verdicts. It is self-evident that this reason is illegitimate, and if *Lockett* rested on this reason, *Lockett* would be illegitimate.

A second reason for the rule is a conviction that the complexities of human behavior preclude any attempt to list the factors that ought to inform the final sentencing decision. This is the rationale the *Lockett* plurality gives for its rule. Full information and a wide range of factors increase the accuracy of sentencing. *Id.*, at 602-603.

D. Aggravation: The Indispensable Flip Side.

If the final stage of capital sentencing is truly to be individualized, mitigating circumstances cannot be considered in a vacuum. Whether the factors proffered in mitigation *really do* "call for a less severe penalty," see *id.*, at 605, necessarily depends on the relevant factors in aggravation.

A hypothetical will illustrate. A and B are both convicted of rape and murder, a death-eligible offense. They are equally culpable of the crime. They both offer the same mitigation:

they were drunk. Both have criminal records, so neither can claim lack of a record as mitigation. A's record, however, is a single prior conviction of unarmed robbery, while B has committed numerous previous rapes, including exceptionally brutal and sadistic acts.

Prior conviction of a violent felony less than murder is generally not an eligibility circumstance. Indeed, in *Zant* v. *Stephens* the state court had previously stricken a similar circumstance as unconstitutionally vague. 462 U. S., at 867. Yet if their criminal records cannot be considered as aggravating, the sentencing profiles of A and B are badly skewed. They appear to be equally deserving of the death penalty, when in fact B is vastly more deserving.

For mitigating evidence to perform its accuracy-enhancing function, it must be presented and considered in the context of aggravating evidence. Mitigation without aggravation makes no more sense than peaks without valleys. Just as accuracy is enhanced by consideration of all relevant mitigating factors, so it is enhanced by consideration of all relevant aggravating factors.

Time and again, this Court has reiterated the legitimacy of broad aggravating circumstances in cases where the jury is instructed to "weigh." In *Ramos*, quoted *ante*, at 11-12, the factor of future dangerousness was upheld. *Payne* v. *Tennessee*, 115 L. Ed. 2d 720, 736, 111 S. Ct. 2597, 2609 (1991) permits consideration of the impact on the victim..

Both *Ramos* and *Payne* upheld, under statutes which instruct juries to "weigh," the consideration of aggravating factors which would fail the test of *Godfrey* v. *Georgia*, 446 U. S. 420 (1980) and *Maynard* v. *Cartwright*, 486 U. S. 356 (1988). These latter cases struck down the *eligibility* factors "outrageously or wantonly vile" and "especially heinous," because every murder is vile and heinous, and the additional adverbs provide no meaningful place to draw the line. See *Maynard*, 486 U. S., at 364.

By the same logic, "future dangerousness" would fail as an eligibility circumstance, because virtually all murderers will be dangerous, although some will be more so than others. See *ante*, at 10-11. In *Giarratano* v. *Procunier*, 891 F. 2d 483, 489-

490 (1989), for example, the Fourth Circuit rejected a vagueness attack on Virginia's use of "future dangerousness" only because the required narrowing had been done at an earlier stage of the proceedings. Yet *Ramos* expressly upheld future dangerousness as a "weighing" circumstance. See *ante*, at 12.

Victim impact would similarly fail *Godfrey*/*Maynard*. All murders have victims and virtually all victims leave survivors. See *Payne*, *supra*, 115 L. Ed. 2d, at 744, 111 S. Ct., at 2615 (Souter, J., concurring). The prosecutor in *Payne* argued that victim impact was relevant to the "especially heinous" factor in the sentencing phase, see *id.*, 115 L. Ed. 2d, at 729, 111 S. Ct., at 2603, but an eligibility finding under this circumstance based on victim impact alone would unquestionably be insufficient. Thus *Payne* upholds a "weighing" circumstance which is broader and more diffuse than would be allowed for an eligibility circumstance.

In *Barclay* v. *Florida*, 463 U. S. 939, 946 (1983), the trial judge considered Barclay's criminal record as an aggravating circumstance, even though Florida law does not permit this. Part II B of the plurality opinion addresses the question of whether Florida law could constitutionally have permitted his criminal record to be considered. It holds simply that the principle of broad aggravating circumstances set forth in *Zant* v. *Stephens* applies equally to Florida. *Barclay*, 463 U. S., at 956.[4] "Criminal record" is a valid sentencing criterion, even though it is too vague to be a valid eligibility circumstance. Cf. *Stephens*, 462 U. S., at 867-868. The *Barclay* concurrence, by the author of *Stephens*, is in complete accord on this point. *Barclay*, 463 U. S., at 966-967, 969-970 (Stevens, J., concurring in the judgment).

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4. The "harmless error" portion of *Barclay* noted in *Stringer* v. *Black*, 117 L. Ed. 2d 367, 379, 112 S. Ct. 1130, 1137 (1992), which is part II C of the *Barclay* opinion, refers only to the claim that the state court was "lawless" in its application of harmless error analysis to the *state law* error. See *Barclay*, 463 U. S., at 957-958. On the federal level, there simply was no error. The *Stringer* majority opinion glosses over this vitally important distinction. The dissent recognizes it. *Stringer*, 117 L. Ed. 2d, at 389, 112 S. Ct., at 1144-1145 (opinion of Souter, J.).

As of 1991, then, the law was settled beyond question. Once the eligibility hurdle is cleared, the Constitution does not limit sentencers to consideration of aggravating factors which meet the specificity requirement of *Godfrey/Maynard*. This principle applies to all state systems, whether they instruct juries to "weigh," as in *Ramos*, *Payne*, and *Barclay*, or whether they do not, as in *Zant* v. *Stephens*.

E. Reconciling Stringer with Ramos.

The single flaw in this otherwise clear crystal is a single, citeless sentence in *Stringer* v. *Black*, 117 L. Ed. 2d 367, 382, 112 S. Ct. 1130, 1139 (1992): "A vague aggravating factor used in the weighing process is in a sense worse [than a vague eligibility factor], for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance."

The main issue in *Stringer* was whether Mississippi's "aggravating" circumstances are subject to the specificity requirement of *Godfrey*. The circumstances function the same way as Florida's, *i.e.*, at least one must be found true, and those found true are the only ones "weighed" in aggravation. *Id.*, 117 L. Ed. 2d, at 378, 112 S. Ct., at 1136. The state argued that *Godfrey* did not apply because the required "narrowing" had been done in the guilt phase. This Court rejected that argument on the basis of Mississippi Supreme Court precedent. *Id.*, 117 L. Ed. 2d, at 380-381, 112 S. Ct., at 1137-1139.

Godfrey thus applies to the factors a state uses to establish the last "plane" dividing death-eligible from death-ineligible cases, cf. *Stephens*, *supra*, 462 U. S., at 871, regardless of whether earlier divisions would be constitutionally sufficient. This holding was sufficient to resolve the case before the Court, and the *Stringer* opinion could have stopped there. However, *Stringer* goes on to make the statement quoted above.

If the quoted sentence would overrule the "myriad of factors" holding of *Ramos*, see *ante*, at 11-12, then *Stringer* improperly created a new rule on habeas corpus and should, to that extent, be disapproved. See *Butler* v. *McKellar*, 494 U. S.

407, 412 (1990) (overruling precedent is "new rule"). If it does not, then it must be reconciled with *Ramos*.

Stringer and *Ramos* cannot be distinguished on the ground that "future dangerousness" is somehow less vague than "especially heinous." As noted earlier, both factors ask the sentencer to place the crime or criminal on a continuum without objective markings. Furthermore, *Ramos*'s "myriad of factors" discussion and extensive reliance on *Zant* v. *Stephens* preclude any distinction on this basis.

The two cases also cannot be distinguished on the ground of "weighing" versus "nonweighing." At the time *Ramos* was decided, the California system was *more* of a strict "weighing" process than the Mississippi system. Mississippi juries are told to further consider whether the aggravating circumstances are insufficient to warrant death despite their outweighing the mitigating, *Coleman* v. *State*, 378 So. 2d 640, 646-647 (Miss. 1979), while California juries at the time of *Ramos* were given no such instruction, see *Boyde* v. *California*, 494 U. S. 370, 373, n. 1 (1990) (quoting pre-1986 instruction).

The only distinctions which make a difference, then, are the breadth of factors considered on the aggravating side of the scale and the manner in which those factors are screened. In Mississippi, a statutory list is presented to the jury for unanimous findings of true or false. Only those "found to exist" are permitted to be considered. Miss. Code Ann. § 99-19-101(2)(c) (Supp. 1993). In California, the jurors generally make no findings on the second-stage factors,[5] and they need not agree on them. *People* v. *Cox*, 53 Cal. 3d 618, 692, 809 P. 2d 351, 395 (1991). Indeed, the factor of "circumstances of the crime," see Cal. Penal Code § 190.3(a), is not susceptible to a true or false answer.

This distinction is reinforced by *Stringer*'s description of the evil it sought to avoid: "the risk that the jury will treat the

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5. There is an exception to this general rule for prior crimes. For the benefit of the defendants, each juror must find beyond a reasonable doubt that the defendant committed the prior crime before that juror may consider it. California Jury Instructions, Criminal § 8.87 (5th ed., Supp. 1994).

defendant as more deserving of the death penalty than he might otherwise be by relying on the *existence* of an *illusory* circumstance." *Stringer*, *supra*, 117 L. Ed. 2d, at 382, 112 S. Ct., at 1139 (emphasis added). This creates a possibility of "randomness." *Ibid*. Why is this a risk in Mississippi and not in Georgia or California?

Suppose two defendants, C and D, are tried for similar murders. Both crimes are heinous. In Mississippi, both juries are asked to decide, yes or no, whether the crimes are "especially heinous." With no further guidance, C's jury may say yes and D's may say no, based on differences in the jurors' sensitivity rather than an actual difference in the crimes. The circumstance was "found to exist" in C's case but not D's. C's jury would therefore include heinousness on "death's side of the scale," and D's would be instructed not to. This is "randomness," causing C to be considered "more deserving of the death penalty" than D, for no valid reason.

In Georgia and California, this randomness is absent. Both juries will consider the heinousness of the crime. In Georgia, they do so because the final phase is open to all aggravating circumstances. In California, they do so because heinousness is a "circumstance of the offense." All murders are heinous, and the *degree* of heinousness is a proper consideration among the "myriad of factors" permitted under *Ramos*. There is no illusory circumstance. There is no randomness. Both juries give "weight" to the heinousness in the proportion they believe it deserves.

The difference is "the different role played by aggravating factors." *Stringer*, 117 L. Ed. 2d, at 380, 112 S. Ct., at 1137. In Florida and Mississippi the finding of truth of the eligibility factors is the exclusive gateway to the prosecution's case for penalty, while in Georgia and California the eligibility factors do not play this role.

The *Ramos* principle is as sound today as it was the day *Ramos* was decided. The sentencer is not constitutionally limited to considering those factors which meet the *Godfrey* test of specificity. The sentencer may consider "a myriad of factors," and this is true regardless of whether the sentencer "weighs."

III. California's system is less prone to discrimination than others previously upheld.

Amici supporting the defendants assert vigorously that minimizing the influence of racial prejudice has been an essential component of this Court's death penalty jurisprudence. See Brief for American Civil Liberties Union, et al. as *Amici Curiae* ("ACLU Brief") 11-15. With this statement *amicus* CJLF wholeheartedly agrees. Far from being a reason to accept defendants' position, however, this is a reason to reject it.

The simplest way to "fix" California's system, if this Court should declare it "broken," would be to adopt the Georgia system. Instead of limiting aggravating circumstances to the statutory list, California could open up the penalty phase to any and all aggravating circumstances the jury wishes to consider, and then instruct the jurors to "consider" rather than "weigh."

In *Zant* v. *Stephens*, 462 U. S. 862, 875 (1983), this Court unequivocally rejected the argument that "the mandate of *Furman* is violated by a scheme that permits the jury unbridled discretion" once the eligibility finding has been made. This holding was based in part on Georgia's appellate review procedures. *Id*., at 890. However, the next term the Court made clear that this holding referred only to meaningful appellate review, not necessarily intercase proportionality review. California's system of automatic reconsideration by the trial judge followed by automatic appeal to the state supreme court fulfills this requirement. *Pulley* v. *Harris*, 465 U. S. 37, 52-53 (1984); *id*., at 58-59 (Stevens, J., concurring in part).[6] The question, then, is whether California's minimal structuring of the final sentencing decision is likely to promote racial discrimina-

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6. The death-eligibility determination in California is different from Georgia, but the difference is not of constitutional magnitude. California's "special" circumstances are broader than Georgia's "aggravating" circumstances, but California divides murder into degrees while Georgia does not. Compare Cal. Penal Code §§ 189, 190.2 with *Stephens*, *supra*, 462 U. S., at 871. The division of murder into degrees, by itself, renders half of all California murderers exempt from capital punishment. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Tennessee* v. *Middlebrooks*, No. 92-989, at 21.

tion, when considered *relative to* the completely unbridled discretion approved in Georgia.

In answering this question, one must consider not only the Scylla of excessive discretion but also the Charybdis of excessive rigidity. If equality of application were the only criterion for constitutionality of a capital sentencing system, then mandatory sentencing would, at first blush, seem to be the solution. Indeed, in the wake of *Furman* v. *Georgia*, 408 U. S. 238 (1972), California enacted such a statute in the well-founded belief that *Furman* required mandatory sentencing. See *Rockwell* v. *Superior Court*, 18 Cal. 3d 420, 446-448, 556 P. 2d 1101, 1116 (1976) (Clark, J., concurring).

As noted *ante*, at 14, *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) rejected mandatory sentencing, partly because it collided with another constitutional principle, but also because a sweeping, mandatory death sentence for all first-degree murderers would not be enforced as written, and would thus be uneven in practice. *Id.*, at 303. A sentencing mandate which is strongly at odds with a basic societal consensus regarding what sentence is appropriate raises the danger of sporadic nullification. This danger, in turn, raises the danger of racial inequality, because people may be less willing to violate their instructions for a defendant or a victim of a different race. See *Graham* v. *Collins*, 122 L. Ed. 2d 260, 293, 113 S. Ct. 892, 917 (1993) (Stevens, J., dissenting).

Thus, a statute that precludes consideration of a factor uniformly considered strongly mitigating may discriminate against minority defendants, as majority defendants are more likely to receive the benefit of jury nullification of the statute. Conversely, a statute that precludes consideration of a factor uniformly regarded as strongly aggravating may result in a denial of equal justice to minority victims, since jurors may be less motivated to disobey instructions to achieve justice for such a victim. Regardless of whether this latter type of inequality is a ground for attacking a state's sentencing system, see generally *McCleskey* v. *Kemp*, 481 U. S. 279 (1987), the state certainly has a powerful and wholly legitimate interest in avoiding such inequality.

The competing concerns are best resolved by expressly granting the jury discretion and by directing the jurors to exercise that discretion on the basis of those factors that society as a whole believes to be most pertinent to the decision, both on the aggravating side and the mitigating side.

On the mitigating side, this Court has gone far beyond societal consensus and insisted that the defendant be permitted consideration of any factor he proffers as mitigating. *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality). As this Court is very much aware, defense lawyers have seized upon the *Lockett* rule to proffer some truly amazing evidence as "mitigating."

> "Every month, defendants who claim a special victimization file with this Court petitions for certiorari that ask us to declare that some new class of evidence has mitigating relevance 'beyond the scope' of the State's sentencing criteria. It may be evidence of voluntary intoxication or of drug use. Or even—astonishingly—evidence that the defendant suffers from chronic 'antisocial personality disorder'—that is, that he is a sociopath. See Pet. for Cert. in *Demouchette* v. *Collins*, O. T. 1992, No. 92-5914, p. 4, cert. denied, 505 U. S. ___ (1992)." *Graham* v. *Collins*, 122 L. Ed. 2d 260, 291, 113 S. Ct. 892, 915 (1993) (Thomas, J., concurring).

One *amicus* in the present case criticizes the variety of arguments prosecutors have made on aggravating circumstances. See Brief for California Appellate Project as *Amicus Curiae* 14-15. These examples pale in comparison to what the defense has done with *Lockett*. However, *Lockett* is now firmly entrenched as precedent, and the question is what breadth will be permitted on the other side.

The boundaries here would seem to be well marked. This Court has permitted both of the extreme positions. It is constitutional to base the final decision on only those narrowly defined aggravating factors used to define the death-eligible class, see *Proffitt* v. *Florida*, 428 U. S. 242, 248 (1976), despite the skewed sentencing profile that may result, see *ante*, at 15-16. Conversely, it is constitutional to give the jury free rein to define its own aggravating circumstances, *Zant* v. *Stephens*, *supra*, 462 U. S., at 875, subject only to the limitation that factors which are

impermissible for reasons other than breadth or vagueness may not be used, see, *e.g.*, *Dawson* v. *Delaware*, 117 L. Ed. 2d 309, 318, 112 S. Ct. 1093, 1098 (1992) (First Amendment violation).

While these other systems are within the broad limits of constitutionality, *amicus* submits that the California system, which takes the middle ground between them, is superior to either. California directs the jury's attention precisely where it ought to be.

"What is important at the selection stage is an *individualized* determination on the basis of the character of the individual *and the circumstances of the crime*." *Zant* v. *Stephens*, *supra*, 462 U. S., at 879 (second emphasis added). Without mentioning this unequivocal holding, though they cite the case elsewhere, *amici* ACLU, et al. denounce the California statute for telling the jurors to consider precisely what this Court has said they must consider. See ACLU Brief 15-23.

The other factor deemed important by *Stephens* is the "character of the individual." Although important for individualization, this factor has greater potential for discriminatory application, since it necessarily involves an inquiry into the defendant's entire life, as opposed to the circumstances of a single incident.

For the benefit of the defendant, California places substantial restrictions on bad-character aggravation. Character aggravation is limited to prior forcible or violent crimes and prior felony convictions. Cal. Penal Code § 190.3(b) and (c). This limitation excludes all nonviolent misdemeanors and all felonies for which the defendant was not prosecuted. All crimes of any kind for which the defendant was prosecuted and acquitted are excluded. *Id.*, para. 3; cf. *United States* v. *Boney*, 977 F. 2d 624, 635 (CA DC 1992). Bad character evidence is thus trimmed down, for the benefit of the defendant, to the most pertinent and most reliable kinds of evidence: prior violent crimes because they are most pertinent, and prior felony convictions because they are both pertinent and reliable.[7]

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7. The state can, of course, offer broader "bad character" evidence in rebuttal if defendant chooses to open the door with general "good character" evidence. See *Dawson*, *supra*, 117 L. Ed. 2d, at 318-319,

By trimming down the aggravating circumstances, but not attempting a specific, *Godfrey*-qualified enumeration, California directs the jury to the essential factors of circumstances of the offense and character of the defendant. It avoids both the enormous breadth of Georgia's unlimited aggravation and the artificial skewing of Florida's limitation to eligibility factors.

Amici ACLU, et al. contend that "allowing California capital jurors to weigh any and all 'circumstances of the crime' they subjectively find to be aggravating without limitation or guidance results in those jurors exercising the unlimited discretion condemned in *Furman*." ACLU Brief 18. But "circumstances *of the crime*" is substantially greater guidance than is given in the approved Georgia system. It focuses the jury on the crime and not on a generalized disapproval of the defendant, his lifestyle, or the people he has associated with.

The ACLU cites no empirical evidence for the proposition that California's system is more prone to racial discrimination than the Georgia or Florida systems. CJLF has located only one published study on the penalty phase of California capital sentencing, and it points in the opposite direction.

Stephen Klein and John Rolph of the Rand Corporation analyzed the case characteristics of 496 death-eligible homicides. Using a computer "classification tree" program, they identified the factors that actually make a difference, in a statistically significant manner, in the sentencing decision. Klein & Rolph, Relationship of Offender and Victim Race to Death Penalty Sentences in California, 32 Jurimetrics J. 33, 39-41 (1991). Adding race to the mix, either the defendant's or the victim's, did not improve the predictability to any significant degree. *Id.*, at 43.

> "There was no evidence in our California database to indicate that the death penalty is imposed in an arbitrary or racially discriminatory manner. Receiving this penalty in our sample was moderately predictable due to its relationship to a combination of offender, victim, and crime characteristics. After accounting for some of the many factors that may influence penalty decisions, neither race of defendant nor

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112 S. Ct., at 1098-1099; cf. Fed. Rule Evid. 404(a)(1).

> race of victim appreciably improved prediction of who was sentenced to death and who received [life without possibility of parole]. In short, the empirical evidence is consistent with the principle that race of victim should not play a role in sentencing decisions." *Id.*, at 44.

This study has been published, and thus subject to peer review, for over three years. See *Daubert* v. *Merrell Dow Pharmaceuticals*, 125 L. Ed. 2d 469, 483, 113 S. Ct. 2786, 2797 (1993) (importance of publication and peer review). After checking the citation indices available at the date of this writing, *amicus* CJLF has found no published criticisms of the study, a remarkable silence for an article whose conclusion is anathema to the political orthodoxy of academia.

There is no perfect system for deciding which defendants will pay the full price for their crime and which will be granted mercy. *Lockett*, *supra*, 438 U. S., at 605. But neither Georgia's wide-open aggravation rule nor Florida's artificially limited list is an improvement over California's moderate approach. Neither is likely to do a better job of minimizing the impact of racial prejudice. The California compromise is constitutional.

IV. Striking down California's law now would contribute to the very evil *Furman* was intended to correct.

At some point, the constitutionality of a state's basic capital sentencing structure should be finally settled. The list of circumstances under attack here has been the law of California for 17 years. See *Pulley* v. *Harris*, 465 U. S. 37, 52, n. 14 (1984) (quoting 1977 statute).[8] California's system has been to this Court for review four times during those years, *Harris*, *supra*; *California* v. *Ramos*, 463 U. S. 992 (1983); *California* v. *Brown*, 479 U. S. 538 (1987); *Boyde* v. *California*, 494 U. S. 370 (1990), and been upheld every time. Enough is enough.

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8. The only factor added by the 1978 initiative was the crystal clear factor of prior conviction of a felony. Compare *ibid.* with Cal. Penal Code § 190.3(c).

The time for "discovering" fundamental defects not previously seen is long since past.

The course of this Court's capital sentencing jurisprudence has not been smooth for either supporters or opponents of capital punishment. Each side can point to decisions it believes are deeply, fundamentally wrong.

Yet the states which have capital punishment have accommodated the twists and turns, however much they may disagree with them. In the wake of *Woodson*, mandatory sentencing laws were repealed, even for life inmates otherwise exempt from any judicial punishment. See *Sumner* v. *Shuman*, 483 U. S. 66, 72, n. 2 (1987). The *Lockett* rule was accommodated by strained constructions of statutes. See *Songer* v. *State*, 365 So. 2d 696, 700 (Fla. 1978) (*per curiam*); *People* v. *Brown*, *supra*, 40 Cal. 3d, at 541, 709 P. 2d, at 456. The Texas Legislature acted promptly to accommodate *Penry* v. *Lynaugh*'s disapproval of its previously approved system. See *Graham* v. *Collins*, 122 L. Ed. 2d 260, 288, n. 9, 113 S. Ct. 892, 913, n. 9 (1993) (Thomas, J., concurring).

However, California has not acted to strip the jury of its authorization to "consider a myriad of factors to determine whether death is the appropriate punishment" for a defendant previously determined to be in the eligible class. See *Ramos*, *supra*, 463 U. S., at 1008. It did not for the clear and simple reason that this Court declared unequivocally that this practice "presents no constitutional problem." *Id.*, at 1008, n. 22.

Hundreds of capital cases have been tried and appealed since then. See U. S. Bureau of Justice Statistics, Capital Punishment 1991, p. 15. The cost has been enormous, not only in dollars but in the anxiety of the victims' families waiting for the creaking judicial machine to finally deliver justice.

To rule for the defendants in this case, this Court would have to either overrule *Ramos* outright or give it such a cramped and narrow interpretation as to raise grave doubt whether anyone can rely on this Court's precedents. An evasion of the plain meaning of the "myriad of factors" holding of *Ramos* would mean "that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that

the law knows no fixed principles." See *Brown* v. *Allen*, 344 U. S. 443, 535 (1953) (Jackson, J., concurring in the judgment).

There is no ground for overruling *Ramos*. No new insights have rendered it obsolete. The rule is not "unworkable"; it is not "a remnant of abandoned doctrine"; no facts have changed. See *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 120 L. Ed. 2d 674, 700, 112 S. Ct. 2791, 2808-2809 (1992) (lead opinion). The rule most definitely is, however, "subject to a kind of reliance that would lend a special hardship to the consequences of overruling . . . ." *Ibid.*, 112 S. Ct., at 2808.

An "annually improvised" jurisprudence in the area of capital sentencing procedure is intolerable. See *Morgan* v. *Illinois*, 119 L. Ed. 2d 492, 517, 112 S. Ct. 2222, 2242 (1992) (Scalia, J., dissenting). In such an environment, the only defendants executed would be those the state could push through the system in the "window" period between one revision and the next. Chosen by timing as much as by culpability, they would be "a capriciously selected random handful." See *Furman* v. *Georgia*, 408 U. S. 238, 309-310 (1972) (opinion of Stewart, J.)

If executions are to be consistent and not capricious, if this Court is not to cause the very evil it set out to cure, states must be able to rely on a stable body of law. Approval of a practice must neither be rescinded at whim nor construed so narrowly as to render it meaningless.

To rule for the state in this case does require either narrow interpretation or partial disapproval of some surplus language in *Stringer* v. *Black*, 117 L. Ed. 2d 367, 112 S. Ct. 1130 (1992). The *stare decisis* concerns there, however, are quite different. First, there is no reliance interest whatever. No competent lawyer would try a death penalty case in reliance on an expectation that the statute will be struck down. Second, as a "new and unexpected decision,"[9] *Stringer* has not "become 'part of the tissue of the law.' " See *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 124 L. Ed. 2d 472, 516, 113 S. Ct. 2217, 2248 (1993) (Souter, J., concurring in part). Third, *Stringer*'s second,

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9. Even a pro-defense commentator who applauds the result refers to *Stringer* as a "shocker." Metzner, Anatomy of an Upset: The Supreme Court's Shocker on Habeas Retroactivity, 28 Crim. L. Bull. 521 (1992).

alternative holding is the only one at issue here, see *ante*, at 18, and its "vitality as precedent is limited further by the seeming want of any need of it in resolving the question presented in the case." *Ibid.*, 113 S. Ct., at 2247.

If *Stringer* cannot be limited so as to preserve *Ramos* intact, then it "presents not the usual question of whether to follow a constitutional rule, but the question of which constitutional rule to follow . . . ." *Id.*, 124 L. Ed. 2d, at 517, 113 S. Ct., at 2248.

> "We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940).

Ramos is that prior doctrine. In part II E, *ante*, at 18-20, *amicus* has suggested a way to reconcile *Stringer* with *Ramos* and with California's sentencing system. However, should this Court decide the cases cannot be reconciled, *Stringer* should be disapproved to the extent it is inconsistent with *Ramos*.

CONCLUSION

The judgment of the California Supreme Court should be affirmed.

February, 1994

Respectfully submitted,

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Attorney for Amicus Curiae
Criminal Justice Legal Foundation

APPENDIX

Zant v. *Stephens*, 456 U. S. 410, 412, n. 1 (1982):

Gentlemen of the Jury, the defendant in this case has been found guilty at your hands of the offense of Murder, and it is your duty to make certain determinations with respect to the penalty to be imposed as punishment for that offense. Now in arriving at your determinations in this regard you are authorized to consider all of the evidence received in court throughout the trial before you. *You are further authorized to consider all facts and circumstances presented in extinuation [sic], mitigation and aggravation of punishment* as well as such arguments as have been presented for the State and for the Defense. Under the law of this State every person guilty of Murder shall be punished by death or by imprisonment for life, the sentence to be fixed by the jury trying the case. In all cases of Murder for which the death penalty may be authorized *the jury shall consider any mitigating circumstances or aggravating circumstances authorized by law. You may consider any of the following statutory aggravating circumstances* which you find are supported by the evidence. One, the offense of Murder was committed by a person with a prior record of conviction for a Capital felony, or the offense of Murder was committed by a person who has a substantial history of serious assaultive criminal convictions. Two, the offense of Murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim. Three, the offense of Murder was committed by a person who has escaped from the lawful custody of a peace officer or place of lawful confinement. These possible statutory circumstances are stated in writing and will be out with you during your deliberations on the sentencing phase of this case. They are in writing here, and I shall send this out with you. If the jury verdict on sentencing fixes punishment at death by electrocution you shall designate in writing, signed by the foreman, the aggravating circumstances or circumstance which you found to have been proven beyond a reasonable doubt. Unless one or more of these statutory aggravating circumstances are proven beyond a reasonable doubt you will not be authorized to fix punishment at death. If you fix punishment

at death by electrocution you would recite in the exact words which I have given you the one or more circumstances you found to be proven beyond a reasonable doubt. You would so state in your verdict, and after reciting this you would state, We fix punishment at death. On the other hand, if you recommend mercy for the defendant this will result in imprisonment for life of the defendant. In such case it would not be necessary for you to recite any mitigating or aggravating circumstances as you may find, and you would simply state in your verdict, We fix punishment at life in prison. Now, whatever your verdict may be with respect to the responsibility you have regarding sentencing please write these out, Mr. Foreman, immediately below the previous verdict you have rendered. Be sure that it is dated and that it bears your signature as foreman. Once again when you have arrived at your verdict on the sentencing phase of the case let us know. We will then receive the verdict from you and have it published here in open court. Please retire now and consider the sentence in this case.

Supreme Court, U.S.
FILED
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No. 93-5131

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OCTOBER TERM, 1993

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Respondent.

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Gregg v. Georgia, 428 U.S. 153 (1976) . . . . . *passim*

Hernandez v. New York, 500 U.S. ___, 111 S. Ct. 1859 (1991) 18, 22

Herndon v. Lowry, 301 U.S. 242 (1937) 15

Johnson v. Mississippi, 486 U.S. 578 (1988) 13

Jurek v. Texas, 428 U.S. 262 (1976) 13

Lewis v. Jeffers, 497 U.S. 764 (1990) 9

Lowenfeld v. Phelps, 484 U.S. 231 (1988) 13

Maynard v. Cartwright, 486 U.S. 356 (1988) . . . . *passim*

McCleskey v. Kemp, 481 U.S. 279 (1987) . 10, 11, 12, 14

Miller v. Florida, 373 So. 2d 882 (Fla. 1979) 15

People v. Bacigalupo, 6 Cal.4th 457, 24 Cal. Rptr. 2d 808, 862 P.2d 808 (1993) 7

People v. Edwards, 54 Cal.3d 787, 1 Cal. Rptr. 2d 696, 819 P.2d 436 (1991) . . 8, 16, 17, 22

People v. Montiel, 5 Cal.4th 877, 21 Cal. Rptr. 2d 705, 855 P.2d 1277 (1993) 8

People v. Noguera, 4 Cal.4th 598, 842 P.2d 1160, 15 Cal. Rptr. 2d 400 (1992) 16

People v. Proctor, 4 Cal.4th 499, 842 P.2d 1100, 15 Cal. Rptr. 2d 340 (1992) 9, 16

People v. Sims, 5 Cal.4th 405, 853 P.2d 992, 20 Cal. Rptr. 2d 537 (1993) 16

People v. Tuilaepa, 4 Cal.4th 569, 15 Cal. Rptr. 2d 382, 842 P.2d 1142 (1992) . . . . . *passim*

Powers v. Ohio, 499 U.S. 400 (1991) 18

Proffitt v. Florida, 428 U.S. 242 (1976) 13

Roberts v. Louisiana, 428 U.S. 325 (1976) 13

Rose v. Mitchell, 443 U.S. 545 (1979) 11

Shell v. Mississippi, 498 U.S. 1 (1990) 15

Strauder v. West Virginia, 100 U.S. 303 (1880) . . 11, 12

Stringer v. Black, 503 U.S. ___, 112 S. Ct. 1130 (1992) 8, 10, 14

Turner v. Murray, 476 U.S. 28 (1986) 10, 12, 19, 22, 23

United States v. Johnson, 956 F.2d 894 (9th Cir. 1991) 22

Vasquez v. Hillery, 474 U.S. 254 (1986) 11, 12, 19

Whitus v. Georgia, 385 U.S. 545 (1967) 12

Woodson v. North Carolina, 428 U.S. 280 (1976) . . . 13

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 11

Zant v. Stephens, 462 U.S. 862 (1983) 13, 15

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Cal. Penal Code § 190.2 . . . . . *passim*

Cal. Penal Code § 190.3 . . . . . *passim*

MISCELLANEOUS

P.T. Baker, J.M. Hanna & T.S. Baker, *The Changing Samoans: Behavior and Health in Transition* (1986) 21, 22

Black and White: A Newsweek Poll, NEWSWEEK, March 7, 1988, at 23 19

Developments in the Law: Race and the Criminal Process, 101 HARV. L. REV. 1472 (1988) 19

P. Faletogo, *A Voice for His People; Samoan Chief Unites Island Beliefs, Mainland Reality*, LOS ANGELES TIMES, May 6, 1993, at p. J1, col.2 21

Ford, *Samoans Hoping Some Good Will Come From Woes*, LOS ANGELES TIMES, February 28, 1989, at pt. 2, p. 1, col. 6 21

C.R. Janes, *Migration, Social Change, and Health: A Samoan Community in Urban California* (1990) 21

King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63 (1993) 19

R. Marcus, *Racial Bias Widely Seen in Criminal Justice System; Research Often Supports Black Perceptions*, THE WASHINGTON POST, May 12, 1992, p. A4 19

A. Millican, *Samoans Proud of Response to Verdict*, LOS ANGELES TIMES, May 25, 1992, at B1, col. 6 . 22

J. Morishima, *Special Employment Issues for Asian Americans*, PUBLIC PERSONNEL MANAGEMENT JOURNAL (1981) 21

S. Sue & J.K. Morishima, *The Mental Health of Asian Americans* (1982) 21

U.S. Census Bureau, *1990 Census of Population and Housing Summary* Tape file 1A (1990) 20

U.S. General Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* (February 1990) 19

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

PAUL PALALAUA TUILAEPA, *Petitioner*,

vs.

STATE OF CALIFORNIA, *Respondent*.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, ASIAN PACIFIC AMERICAN LEGAL CENTER, JOHN C. LANGSTON BAR ASSOCIATION, KOREAN AMERICAN BAR ASSOCIATION, LAWYERS FOR HUMAN RIGHTS, MEXICAN AMERICAN BAR ASSOCIATION, PHILIPPINE-AMERICAN BAR ASSOCIATION OF LOS ANGELES, AND SOUTHERN CALIFORNIA CHINESE LAWYERS' ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

American Civil Liberties Union

The American Civil Liberties Union (ACLU) is a national, nonpartisan organization with almost 300,000 members dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The national

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

ACLU and its three California affiliates (ACLU of Northern California, ACLU of Southern California, and ACLU of San Diego) are acutely concerned with the manner in which capital punishment is imposed in the United States and the effect that racial discrimination has on the administration of the criminal justice system. These and other concerns surrounding capital punishment prompted the creation of the ACLU Capital Punishment Project, which is dedicated to eradicating constitutional violations in capital cases and to educating the public about the serious moral and legal questions that the death penalty raises.

This case presents an issue of substantial concern to the ACLU: Whether California's death sentencing procedures adequately channel and guide juries' discretion to impose the ultimate punishment so as to minimize the influences of racial prejudice and other biases. The ACLU files this brief because without adequate guidance, juries in California may, and do, impose death sentences based on race and other constitutionally impermissible factors.

Asian Pacific American Legal Center

The Asian Pacific American Legal Center is a group of lawyers and non-lawyers who volunteer to serve the Asian Pacific American community in Southern California in a number of capacities, including *pro bono* work by attorneys which involves direct representation, consultation, and *amicus* participation. One community served by the Legal Center is the Samoan community.

Although the Legal Center's main focus is the interest of the Asian Pacific American community, the goals of the organization include a commitment to civil rights and due process of law for all people. After due reflection on the issue of vagueness of the California death penalty statute and the risk that capital sentences may be influenced by racial considerations, the Legal Center submits as *amicus curiae* the

argument set out herein. The Legal Center notes that, as far as anyone at the Center associated with this brief is aware, the Center has neither dealt with nor is acquainted with the petitioner or his family.

The John C. Langston Bar Association

The John C. Langston Bar Association, based in Los Angeles, California, is an association of approximately nine hundred members who practice in all areas of the law in state and federal courts. Two of the Association's primary purposes are to defend and protect the interests of the African-American community and to promote the diligent application of legal skills in furtherance of civil rights and due process of law.

The John C. Langston Bar Association joins as *amicus curiae* because of the deep concern that racism in the judicial system be minimized. As a group, the John C. Langston Bar Association takes no position on the death penalty. However, under California Penal Code section 190.3, racism could well play an invisible, but significant, role in a jury's decision to sentence a defendant to death. Since racism in the sentencing process is intolerable, the John C. Langston Bar Association joins in support of petitioner's argument that authorizing a jury to weigh the "circumstances of the crime" as a factor in aggravation leaves a jury with no guidance in its consideration of both proper and improper matters.

The Korean American Bar Association

The Korean American Bar Association has approximately one hundred members in the greater Los Angeles, California area. The Korean American Bar Association's lawyers practice in all areas of the law. One purpose of the Association is the encouragement of anti-racist attitudes in the community-at-large, as well as in the civil and criminal justice system. While the Association takes no organized position on the death penalty, the Association is

concerned anytime there is a risk of racism playing a part in the judicial system, and such a risk exists with the current California death penalty procedures. Therefore, as more fully set out below, the Korean American Bar Association fears that the California death penalty statute, as written and applied, allows for the possibility of racism through the weighing of the "circumstances of the crime" in aggravation.

Lawyers for Human Rights

Lawyers for Human Rights (LHR), the lesbian and gay bar association of Los Angeles, has approximately three hundred members. LHR is very concerned with human rights in general and civil rights specifically, both for the lesbian and gay community and for the rest of the minority community. Having considered California Penal Code section 190.3 and the instructions given to capital juries, LHR has concluded that these instructions create an unacceptable danger that many forms of discrimination, including racial discrimination, may influence sentencing decisions and therefore submits this brief on behalf of petitioner.

Mexican American Bar Association of
Los Angeles County

The 1500-member Mexican American Bar Association of Los Angeles County (MABA) is the largest local minority bar association in the United States. Among MABA's organizational goals is the advocacy of, and commitment to, human and civil rights and the improvement of the community for Latinos and persons of all races. Having in mind those goals, MABA is concerned with the possibility of racial stereotypes and discrimination influencing a jury's decision to impose a capital sentence. As described below, MABA is particularly alarmed at the provision in the statute which places no limitation on the jury's weighing of the "circumstances of the crime" as a factor in aggravation of sentence. Without such limitations, the California death

sentencing procedures have the great potential to work to the detriment of any minority defendant.

Philippine-American Bar Association of Los Angeles

The Philippine-American Bar Association of Los Angeles encourages the study of law, the exchange of ideas, and awareness of the Philippine position in the community. The Association's legal activities focus on the rule of law and concepts of fairness. A review of California Penal Code section 190.3(a), and reflection upon the part it may play in the death-penalty sentencing process, causes the Association to join with other *amici* in supporting the position that this law has a strong potential for the introduction of racist attitudes in the imposition of the death penalty.

The Southern California Chinese Lawyers' Association

Organized in 1975, the Southern California Chinese Lawyers' Association (SCCLA) is a mutual support network for Chinese American lawyers, jurists, and law students in the Los Angeles area consisting of over four hundred members. SCCLA is deeply concerned about the circumstances which allow racism to enter into the judicial process. As a minority bar association, SCCLA is committed to the advancement of civil rights for all people.

As a result of that commitment, SCCLA has concluded that the "circumstances of the crime" aggravating factor in the jury instructions in this case is unconstitutionally vague and without limits. SCCLA believes that there is a great and real danger that racism could creep, if not march, into jury penalty deliberations. Therefore, SCCLA supports the argument that subsection (a) of California Penal Code section 190.3 is an unconstitutionally vague aggravating factor.

STATEMENT OF THE CASE

A California jury convicted Petitioner Paul Palalaua Tuilaepa of first degree murder, found true the special circumstance that the murder occurred during the commission of a robbery, and sentenced him to death. *People v. Tuilaepa*, 4 Cal.4th 569, 576-77, 15 Cal. Rptr. 2d 382, 385, 842 P.2d 1142, 1145 (1992).

On appeal, Mr. Tuilaepa challenged the constitutionality of California's capital sentencing scheme. California employs a two-step process in determining whether a capital defendant is "death-eligible." The first step entails deciding whether the defendant is guilty of first degree murder and whether at least one "special circumstance" is present. Cal. Penal Code § 190.2(a) (1994).[2]

The second step requires the sentencer to weigh the various factors enumerated in California Penal Code section 190.3. The sentencer is to "consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section" and determine whether one set of circumstances "outweighs" the other in deciding the appropriate sentence.[3] Cal. Penal Code § 190.3 (1994); *see also* Former Cal. Penal Code § 190.3 (1987) (statute in effect at time of murder contained same provisions).[4]

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[2] The statutory special circumstance provisions in effect at the time of the crime and Mr. Tuilaepa's trial provided that death was a possible punishment if (1) the murder was for financial gain; (2) defendant was previously convicted of murder; (3) multiple murders were involved in the present proceeding; (4) the murder was by means of a hidden destructive device; (5) the murder was committed to avoid arrest or to escape from custody; (6) the murder was by means of a destructive device mailed or delivered; (7) the victim was a peace officer; (8) the victim was a federal law enforcement officer; (9) the victim was a fire fighter; (10) the victim was killed to prevent him or her from testifying; (11) the victim was a prosecutor or former prosecutor; (12) the victim was a judge or former judge; (13) the victim was an elected public official; (14) the murder was especially heinous, atrocious and cruel; (15) the defendant killed while lying in wait; (16) the victim was killed because of his or her race, color, religion, nationality or country of origin; (17) the murder was committed during the course of one of nine enumerated felonies; (18) the murder involved torture; (19) the murder was committed by poison. Former Cal. Penal Code § 190.2. Since Mr. Tuilaepa's trial, California Penal Code section 190.2 has been amended to expand the scope of the special circumstances. Cal. Penal Code § 190.2 (1994).

[3] Following the grant of certiorari in this case, the California Supreme Court issued its opinion in *People v. Bacigalupo*, 6 Cal.4th 457, 24 Cal. Rptr. 2d 808, 862 P.2d 808 (1993), on remand from *Bacigalupo v. California*, 506 U.S. ___, 113 S. Ct. 32 (1992), in which the Court reformulated the role of the factors contained in Penal Code section 190.3. Petitioner's Brief and Brief *Amicus Curiae* of the California Appellate Project address the effect of the California Supreme Court's decision on the issues raised in this case. Rather than repeat the discussion in those briefs, *Amici* joins the argument by Petitioner and the California Appellate Project that *People v. Bacigalupo* does not alter the constitutional analysis or infirmity of Penal Code section 190.3.

[4] California Penal Code section 190.3 provides that the following enumerated factors are to be considered by the jury:

> (a) The circumstances of the crime of which the defendant was convicted in the present proceedings and the existence of any special circumstances found to be true;
>
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence;
>
> (c) The presence or absence of any prior felony conviction;
>
> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;
>
> (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the

(continued...)

Mr. Tuilaepa's constitutional challenge included the argument that the California sentencing scheme fails to guide adequately the jury's discretion because Penal Code section 190.3(a), the "circumstances of the crime" aggravating factor, is impermissibly vague under this Court's decision in *Stringer v. Black*, 503 U.S. ___, 112 S. Ct. 1130 (1992). *People v. Tuilaepa*, 4 Cal.4th at 594, 15 Cal. Rptr. 2d at 397, 842 P.2d at 1157.

The California Supreme Court rejected this claim. *Id.* The state court concluded that the "circumstances of the crime" aggravating factor "embodies a consideration the United States Supreme Court has itself identified as 'one of the criteria upon which the jury *should* base its penalty determination.'" *Id.* (quoting *People v. Proctor*, 4 Cal.4th 499, 551, 15 Cal. Rptr. 2d 340, 370, 842 P.2d 1100, 1130 (1992) (emphasis in original)). The court further explained that this sentencing factor was not unconstitutionally vague or "illusory" "simply because [it leaves] the sentencer free to evaluate the evidence in accordance with his or her own subjective values." *People v. Tuilaepa*, 4 Cal.4th at 595, 15 Cal. Rptr. 2d at 397, 842 P.2d at 1158.

[4](...continued)
homicidal act;

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct;

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person;

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication;

(i) The age of the defendant at the time of the crime;

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor;

(k) Any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime.

Although section 190.3 does not designate which of the enumerated factors is aggravating and which is mitigating, the California Supreme Court has "noted that certain of the factors can only be mitigating (e.g., factors (d), (e), (f), (g), (h), and (k))" and "[t]he aggravating nature of certain other factors." *People v. Montiel*, 5 Cal.4th 877, 944, 21 Cal. Rptr. 2d 705, 744, 855 P.2d 1277, 1316 (1993). One of the statutory aggravating factors is section 190.3(a), the "circumstances of the crime." *People v. Edwards*, 54 Cal.3d 787, 833, 1 Cal. Rptr. 2d 696, 725, 819 P.2d 436, 465 (1991).

SUMMARY OF ARGUMENT

In *Furman v. Georgia*, 408 U.S. 238 (1972), a majority of this Court recognized that capital punishment schemes that permit juries to impose death sentences based on their own prejudices and biases invariably produce constitutionally defective sentences. To minimize the risk that racial and other constitutionally impermissible considerations will infect the capital sentencing process, this Court has required that sentencing procedures guide juries in exercising their discretion to impose death. Without such guidance, capital sentencing juries are left "with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*." *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988).

When a state elects to guide the jury's discretion by identifying aggravating factors to be weighed in the sentencing decision, those factors must be "'clear and objective,'" *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990) (quoting *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980)), and "defined with some

degree of precision," *Stringer v. Black*, 112 S. Ct. at 1133. When state procedures permit a jury to find and weigh a vague aggravating factor, there is an unacceptable danger that the resulting death sentence may be based on "an illusory circumstance." *Stringer*, 112 S. Ct. at 1139. Moreover, where the trial involves cross-racial violence or a minority defendant, there is a real and unacceptable risk that the illusory circumstance will be not only illusory but also illicit. In such a case, the attempted "guidance," rather than checking the influence of racism, will serve only to magnify its effects by adding the stamp of instructional authority.

The California death sentencing scheme introduces into the weighing process an aggravating factor so vague that, because of its breadth, it is particularly likely to produce death sentences predicated on illicit factors. California Penal Code section 190.3(a) -- as written and as interpreted by the California Supreme Court -- authorizes juries to find and weigh the "circumstances of the crime" as a factor in aggravation, but provides no guidance as to the scope of that factor or as to what facts might make it aggravating.

Because the California procedures do not "'focus [jurors' consideration] on the *particularized* circumstances of the crime'" that constitute constitutionally permissible aggravating factors, jurors in California are permitted to draw their own inferences. *McCleskey v. Kemp*, 481 U.S. 279, 307 (1987) (quoting *Gregg v. Georgia*, 428 U.S. 153, 199 (1976)) (emphasis added). When jurors are invested with such unlimited discretion to find the existence of a factor that is weighed on death's side of the scale, there is an unacceptable risk that considerations of race and other constitutionally impermissible factors infect capital sentencing decisions. *See Turner v. Murray*, 476 U.S. 28, 35 (1986).

ARGUMENT

THE CALIFORNIA DEATH SENTENCING PROCEDURES UNCONSTITUTIONALLY FAIL TO GUIDE JURY DISCRETION, THUS PERMITTING IMPOSITION OF DEATH SENTENCES BASED ON RACE AND OTHER IMPERMISSIBLE FACTORS.

A. State Sentencing Procedures Must Minimize the Risk of Death Sentences being Imposed Because of Racial Stereotypes and other Constitutionally Impermissible Factors.

This Court has long recognized that racism and racial stereotypes have a pernicious influence on the administration of the criminal justice system. *See, e.g., Rose v. Mitchell*, 443 U.S. 545, 556 (1979); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886). Despite advancements, racial discrimination remains a pervasive influence in our society:

> "114 years after the close of the War Between the States and nearly 100 years after *Strauder* [*v. West Virginia*, 100 U.S. 303 (1880)], racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole."

Vasquez v. Hillery, 474 U.S. 254, 264 (1986) (quoting *Rose v. Mitchell*, 443 U.S. at 558-59).

As a result, this Court has "engaged in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system." *McCleskey v. Kemp*, 481 U.S. at 309 (quoting *Batson v. Kentucky*, 476 U.S. 79, 85 (1986)). These efforts have included invalidating procedures that systematically

exclude cognizable groups from serving on grand[5] and petit juries,[6] prohibiting the use of peremptory challenges of persons from cognizable groups based on group biases,[7] forbidding the exercise of prosecutorial discretion based on racial considerations,[8] ensuring that racial prejudices of prospective jurors can be ascertained during voir dire,[9] and proscribing appeals to racism during argument to the jury.[10]

Similarly, the pervasive effects of racial prejudices have had a pivotal role in the development of this Court's capital sentencing jurisprudence. *See, e.g., Graham v. Collins*, 506 U.S. ___, 113 S. Ct. 892, 906 (1993) (Thomas, J., concurring) ("It cannot be doubted that behind the Court's condemnation of unguided discretion [in *Furman*] lay the specter of racial prejudice -- the paradigmatic capricious and irrational sentencing factor."). Vigilance is essential to minimize the detrimental effects of racism given the role that a jury has in capital sentencing schemes: "Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." *Turner v. Murray*, 476 U.S. at 35. Concerns about possible race bias resulting from the unfettered discretion then afforded capital juries echo throughout the opinions of both concurring and dissenting

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[5] *See Vasquez v. Hillery*, 474 U.S. 254 (1986).

[6] *See Whitus v. Georgia*, 385 U.S. 545 (1967); *Strauder v. West Virginia*, 100 U.S. 303 (1880); *cf. Amadeo v. Zant*, 486 U.S. 214 (1988).

[7] *See Batson v. Kentucky*, 476 U.S. 79 (1986).

[8] *See Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

[9] *Turner v. Murray*, 476 U.S. at 35.

[10] *McCleskey v. Kemp*, 481 U.S. 279, 310 n.30 (1987); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

Justices in the landmark decision of *Furman*.[11]

To correct the constitutional deficiencies recognized in *Furman*, this Court has relied primarily on sentencing procedures that significantly narrow and guide the jury's discretion to impose death. In *Gregg v. Georgia* and the companion cases,[12] this Court concluded that to comport with the requirements of the Eighth Amendment, a sentencer's discretion to impose a death sentence must be "directed and limited" to avoid "wholly arbitrary and capricious action."[13] *Gregg*, 428 U.S. at 189 (joint opinion of Stewart, Powell, and Stevens, JJ.). To ensure nondiscriminatory application, the sentencer's discretion must be curbed and informed "'by clear and objective standards.'" *Id.* at 198 (joint opinion of Stewart, Powell, and Stevens, JJ.) (quoting *Coley v. State*,

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[11] *See Furman*, 408 U.S. at 255, 257 (Douglas, J., concurring); *id.* at 310 (Stewart, J., concurring); *id.* at 364-66 (Marshall, J., concurring); *cf. id.* at 389 n.12 (Burger, C.J., dissenting); *id.* at 449-50 (Powell, J., dissenting).

[12] *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976).

[13] This Court's jurisprudence since *Gregg* consistently has required that capital sentencing procedures protect against the risk of arbitrary and capricious imposition of death sentences. *See Johnson v. Mississippi*, 486 U.S. 578, 585 (1988) (death sentencing decisions "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible'") (quoting *Zant v. Stephens*, 462 U.S. 862, 884-85, 887 n.24 (1983)); *Lowenfeld v. Phelps*, 484 U.S. 231, 244 (1988); *California v. Brown*, 479 U.S. 538, 544 (1987) (O'Connor, J., concurring); *Godfrey v. Georgia*, 446 U.S. at 428; *Gardner v. Florida*, 430 U.S. 349, 358 (1977) ("It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.").

231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974)).[14]

Although States have wide latitude in guiding sentencers' discretion, their death sentencing procedures must do so with reference to constitutionally appropriate factors. In states, such as California, where the jury is required to "weigh" various factors in determining punishment, capital sentencing procedures "cannot use factors which as a practical matter fail to guide the sentencer's discretion." *Stringer v. Black*, 112 S. Ct. at 1139.

When "a person of ordinary sensibility could fairly characterize" an aggravating factor as applying to "almost every murder," or the jury's interpretation of the sentencing factor "can only be the subject of sheer speculation," that factor imposes no restraints upon the arbitrary and capricious infliction of the death sentence. *Godfrey*, 446 U.S. at 429-30; *see also Maynard*, 486 U.S. at 364 (ordinary person could honestly believe every unjustified, intentional killing came within factor). Based upon these considerations, this Court held death sentences imposed upon a finding that the offense was "outrageously or wantonly vile, horrible and inhuman," *Godfrey*, 446 U.S. at 426, or "heinous, atrocious, or cruel,"

[14] It is precisely because of these procedural safeguards that this Court could reject the challenge to capital sentencing patterns brought in *McCleskey v. Kemp*. In *McCleskey*, this Court stated that "constitutional guarantees are met when 'the mode [for determining guilt or punishment] itself has been surrounded with safeguards to make it as fair as possible.'" 481 U.S. at 313 (quoting *Singer v. United States*, 380 U.S. 24, 35 (1965). These safeguards include the requirement that the death sentence be "imposed under [state] sentencing procedures that focus discretion 'on the particularized nature of the crime'." *Id.* at 308 (quoting *Gregg*, 428 U.S. at 206). Where such safeguards exist, this Court may "lawfully presume that [the] death sentence was not 'wantonly and freakishly' imposed," *id.* (quoting *Gregg*, 428 U.S. at 207), and that there is no "constitutionally significant risk of racial bias affecting the [state] capital sentencing process," *id.* at 313.

Shell v. Mississippi, 498 U.S. 1, 1 (1990); *Clemons v. Mississippi*, 494 U.S. 738, 741 (1990); *Maynard*, 486 U.S. at 363-64, violated the Eighth Amendment's proscription against unfettered jury discretion.

Moreover, a sentencing factor, no matter how clearly defined, is constitutionally invalid if it allows the sentencer to

> attach[] the "aggravating" label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant, cf. *Herndon* v. *Lowry*, 301 U.S. 242 (1937), or to conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness. Cf. *Miller* v. *Florida*, 373 So. 2d 882, 885-886 (Fla. 1979). If the aggravating circumstance at issue [is] invalid for reasons such as these, due process of law would require that the jury's decision to impose death be set aside.

Zant v. Stephens, 462 U.S. 862, 885 (1983); *see also Dawson v. Delaware*, 503 U.S. ___, 112 S. Ct. 1093, 1098-99 (1992); *Baldwin v. Alabama*, 472 U.S. 372, 382 (1985).

B. California Death Sentencing Procedures Fail to Provide Juries the Guidance Necessary to Check the Invidious Effects of Racial Biases.

California's statutory response to these constitutional requirements is an instruction to capital juries listing factors to be weighed in determining whether to sentence the defendant to death or life in prison without the possibility of parole. The first factor in this list authorizes the jury to weigh in aggravation "[t]he circumstances of the crime of

which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true." Cal. Penal Code § 190.3(a) (1994). The question directly presented in this case is whether the "circumstances of the crime" aggravating factor furnishes the type of specific and detailed guidance required by the Eighth Amendment. *Amici* respectfully submit that neither the statutory language nor the state judicial interpretation of the factor performs this constitutional function.

The statutory language of California Penal Code section 190.3(a) fails to focus or narrow in any manner the jury's discretion to impose death. Section 190.3(a) instructs the jury to find and weigh the "circumstances of the crime" as aggravation *in addition to* any special circumstances found to be true. Thus, although the statute informs California juries that the "circumstances of the crime" are other than the special circumstances, they are provided no other guidance. Thus, the jury is invited to make a subjective determination as to what additional aspects of the crime constitute aggravation.

The California Supreme Court has not applied a "narrowing principle" to Penal Code section 190.3(a).[15] *Maynard*, 486 U.S. at 363. On the contrary, that court recently stated that it has not yet "explore[d] the outer reaches of the evidence admissible as a circumstance of the crime." *People v. Edwards*, 54 Cal.3d 787, 835, 819 P.2d 436, 467, 1 Cal. Rptr. 2d 696, 727 (1991). Indeed, the California Supreme Court has acknowledged that section 190.3(a) permits -- even requires -- subjective, impermissible factors to influence a California jury's decision to impose death. The state court has concluded that the "circumstances of the crime" aggravating factor does not encompass "merely the immediate temporal and spatial circumstances of the crime," *People v. Edwards*, 54 Cal.3d at 833, 1 Cal. Rptr. 2d at 725, 819 P.2d at 465, but "leave[s] the sentencer free to evaluate the evidence in accordance with his or her own subjective values," *People v. Tuilaepa*, 4 Cal.4th at 595, 15 Cal. Rptr. 2d at 398, 842 P.2d at 1158.

As written and as interpreted by the California Supreme Court, the "circumstances of the crime" aggravating factor provides no "clear and objective standards" to guide a California sentencer's discretion to impose death. *See Gregg*, 428 U.S. at 198 (joint opinion of Stewart, Powell and Stevens, JJ.). Although it is appropriate to direct the jury to find and weigh certain facets of the crime in imposing death, such an inquiry is constitutional only when it is "focus[ed] on the *particularized* circumstances of the crime and the defendant." *Id.* at 199 (joint opinion of Stewart, Powell, and Stevens, JJ.) (emphasis added); *see also Maynard*, 486 U.S. at 363 (this Court has "plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty").[16]

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[15] The California Supreme Court has found no need to limit the "circumstances of the crime" factor because it has consistently held that its language is neither "'illusory' nor otherwise impermissibly 'vague.'" *People v. Tuilaepa*, 4 Cal.4th at 595, 15 Cal. Rptr. 2d at 397, 842 P.2d at 1158; *see also People v. Sims*, 5 Cal.4th 405, 466, 853 P.2d 992, 1030, 20 Cal. Rptr. 2d 537, 575 (1993); *People v. Noguera*, 4 Cal.4th 598, 648-49, 842 P.2d 1160, 15 Cal. Rptr. 2d 400, 429 (1992); *People v. Proctor*, 4 Cal.4th 499, 551, 842 P.2d 1100, 1130, 15 Cal. Rptr. 2d 340, 370 (1992).

[16] This Court in *Gregg* upheld Georgia's death sentencing scheme in part because the jury's attention was directed to "the specific circumstances of the crime." *Gregg*, 428 U.S. at 197. These specific circumstances included:

> Was it committed in the course of another capital felony?

(continued...)

In contrast to a "particularized" inquiry, the jury's interpretation of what constitutes the "circumstances of the crime" aggravating factor under Penal Code section 190.3(a) "can only be the subject of sheer speculation." *Godfrey*, 446 U.S. at 429. Moreover, section 190.3(a), by its very terms, applies to every capital offense and accordingly, "a person of ordinary sensibility could fairly characterize" it as doing so. *See Godfrey*, 446 U.S. at 428-29; *Maynard*, 486 U.S. at 363. Thus, allowing California capital jurors to weigh any and all "circumstances of the crime" they subjectively find to be aggravating without limitation or guidance results in those jurors exercising the unfettered discretion condemned in *Furman*. *See Cartwright v. Maynard*, 822 F.2d 1477, 1491 (10th Cir. 1987) ("The discretion of a sentencer who can rely upon all of the circumstances of a murder is as complete and as unbridled as the discretion afforded the jury in *Furman*."), *aff'd*, 486 U.S. 356 (1988).

Most important, because the aggravating circumstance is vague and imprecise, there is an unacceptable risk that impermissible considerations such as race play a role in California's capital sentencing scheme. California's vague and imprecise aggravating factor permits "those to discriminate who are of a mind to discriminate." *Avery v. Georgia*, 345 U.S. 559, 562 (1953). As this Court recently recognized, "race prejudice stems from various causes and may manifest itself in different forms." *Powers v. Ohio*, 499 U.S. 400, 416 (1991); *see Hernandez v. New York*, 500 U.S. ___, 111 S. Ct. 1859, 1872 (1991) (language differences may elicit "ridicule and scorn" as a result of racial hostility). In

[16](...continued)
Was it committed for money? Was it committed upon a peace officer or judicial officer? Was it committed in a particularly heinous way or in a manner that endangered the lives of many persons? *Id.*

a society where race discrimination "still remain[s] a fact of life," *Hillery*, 474 U.S. at 264, jurors' sentencing decisions cannot help but be swayed by negative stereotypes about racial groups and members of racial groups. These negative racial stereotypes "produce a 'reverse halo effect': members of negatively stereotyped groups are assumed to possess negative traits, and positive information about them is devalued." King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 77 (1993).[17]

This Court has recognized that the dangers associated with negative racial stereotypes is magnified in the context of capital sentencing. A juror who believes stereotypical assumptions that members of a certain cognizable group are "violence prone or morally inferior might well be influenced by that belief" in deciding to impose the sentence of death. *Turner*, 476 U.S. at 35. In addition, such a juror may be "less favorably inclined" toward a capital defendant's mitigating evidence. *Id.* This Court also has recognized that more subtle racist attitudes such as the fear of members of a

[17] Public opinion polls confirm the widespread acknowledgement that racial discrimination persists in the criminal justice system. *See* R. Marcus, *Racial Bias Widely Seen in Criminal Justice System; Research Often Supports Black Perceptions*, THE WASHINGTON POST, May 12, 1992, p. A4; *Black and White: A Newsweek Poll*, NEWSWEEK, March 7, 1988, at 23. Such discrimination has been noted in racial disparities in non-capital sentencing rates, *see Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1603 & n.35 (1988) (reviewing literature); racial disparities in the charging, sentencing and imposition of the death penalty after the *Gregg* decision, *see* U.S. General Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* (February 1990), reprinted in 136 Cong. Rec. S6889-90 (daily ed. May 24, 1990); and the propensity of prosecutors to exercise peremptory challenges based on group biases, *see Batson v. Kentucky*, 476 U.S. at 103-104 (Marshall, J., concurring) (reviewing data from various jurisdictions).

cognizable group "could easily be stirred up by the violent facts of [a capital crime]" and influence a juror's decision to impose death. *Id.*

As with all California capital juries, the jury that sentenced Mr. Tuilaepa to death was authorized to find and weigh on death's side of the scale the "circumstances of the crime" aggravating factor. R.T. 885. The vagueness of this factor, in combination with the distinct possibility that racial prejudice influenced the jury's decision, created an unacceptable risk that impermissible considerations infected the decision that Mr. Tuilaepa should die.

Mr. Tuilaepa is Samoan; he moved from Samoa to California with his family when he was a boy. *People v. Tuilaepa*, 4 Cal.4th at 581, 15 Cal. Rptr. 2d at 388, 842 P.2d at 1148. The offenses for which Mr. Tuilaepa was sentenced to death occurred in Long Beach, where Samoans constitute a visible, but small, minority of the population.[18]

California jurors, especially those in the area in which petitioner Tuilaepa was tried and sentenced to death, are exposed to, and may well be influenced by, a variety of negative racist stereotypes about Samoans. Mr. Tuilaepa's jurors, like the community they reflect, likely relied on generalizations about Samoans as the natural consequence of a lack of "meaningful interaction" with the Samoan community:

> [White Americans'] expectations, then, are likely to be based upon generalizations gleaned from others, the mass media, childhood impressions, and the like. . . . [White Americans] have little experience, typically, in interacting with Asian and Pacific Americans on a meaningful personal level. As a result [they] are likely to be highly influenced by . . . stereotypes.

J. Morishima, *Special Employment Issues for Asian Americans*, PUBLIC PERSONNEL MANAGEMENT JOURNAL 384, 390 (1981).[19]

The majority culture's stereotypes include generalizations that Samoans are "aggressive; easily provoked; . . . illiterate; related to one another; . . . obese; slow moving; loud." S. Sue & J.K. Morishima, *The Mental Health of Asian Americans* 117 (1982). Although the vast majority of Samoans do not engage in violent behavior, Samoans are "perceived as highly aggressive, and are known as quick-tempered brawlers." P.T. Baker, J.M. Hanna & T.S. Baker, *The Changing Samoans: Behavior and Health in Transition* 412 (1986). *Accord* A. Millican, *Samoans Proud*

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[18] Census figures from 1990 indicate that 31,917 Samoans lived in California, with 11,934 residing in Los Angeles County, 2,262 residing in Carson, 1,198 residing in Compton and 3,199 residing in Long Beach. U.S. Census Bureau, *1990 Census of Population and Housing Summary* Tape file 1A (1990).

[19] Samoans describe themselves as "one of the most ignored and misunderstood ethnic groups in Southern California, one that is hit disproportionately hard with poverty, high unemployment and school dropout rates." A. Ford, *Samoans Hoping Some Good Will Come From Woes*, LOS ANGELES TIMES, February 28, 1989, at pt. 2, p. 1, col. 6. The Samoan community's perception of their low status in society is confirmed by socio-economic indicators. Poverty is rampant in the California Samoan community. Samoans have the highest unemployment rates of all Asian and Pacific Island groups in California, with the exception of Asian Indian women. C.R. Janes, *Migration, Social Change, and Health: A Samoan Community in Urban California* 50-51 (1990). United States Census figures indicate that the median annual family income for Samoans stands at $14,242, barely two-thirds of the United States average of $19,917. P. Faletogo, *A Voice for His People; Samoan Chief Unites Island Beliefs, Mainland Reality*, LOS ANGELES TIMES, May 6, 1993, at p. J1, col.2.

of Response to Verdict, LOS ANGELES TIMES, May 25, 1992, at B1, col. 6 (Samoan leaders attempt to fight the "stereotype of the big, bad Samoans" and perceptions of their community as "violent and primitive."); *see also United States v. Johnson*, 956 F.2d 894, 897, 905 (9th Cir. 1991) (discussing "The Samoans," a group of large, violent men, not all of Samoan ancestry, who acted as enforcers for a drug lord).

The risk that racial prejudices played a role in Mr. Tuilaepa's death sentence cannot be discounted. Mr. Tuilaepa's crime was interracial -- he was convicted of murder for the killing of a white male -- and, as this Court has recognized, "it is plain that there is some risk of racial prejudice influencing a jury whenever there is a crime involving interracial violence." *Turner v. Murray*, 476 U.S. at 36 n.8. Because the California Supreme Court has failed to delimit "the outer reaches" of the "circumstances of the crime" that may be aggravating, the instructions did not reduce the influence of racial prejudice, and indeed, implicitly authorized predicating a death judgment on the cross-racial circumstances of the crime.

Free to roam the potentially unlimited "temporal and spatial circumstances of the crime," *People v. Edwards*, 54 Cal.3d at 833, 819 P.2d at 465, 1 Cal. Rptr. 2d at 725, jurors' racial bias, including that associated with language differences, and cultural stereotypes may well have led them to give aggravating effect to Mr. Tuilaepa's mitigating evidence. *Id.* at 35. The need for Mr. Tuilaepa's mother, who speaks only Samoan, to present her testimony through an interpreter at the sentencing phase,[20] may well have elicited "ridicule and scorn" or any number of negative images from the jurors. *See Hernandez v. New York*, 111 S. Ct. at 1872. The mitigating evidence about family tragedies endured by

[20] *People v. Tuilaepa*, 4 Cal.4th at 581, 15 Cal. Rptr. 2d at 388, 842 P.2d at 1148.

Mr. Tuilaepa -- that one brother was killed in a fight and another brother paralyzed as a result of a gunshot wound -- may well have reinforced jurors' stereotypical assumptions that Samoans are violent and inferior, and inflamed jurors' subconscious fears of violent, primitive Samoans that already were stirred up by the violent facts of the capital offense. *See Turner v. Murray*, 476 U.S. at 35.

In short, the instruction to Mr. Tuilaepa's jurors that they were to weigh the "circumstances of the crime" aggravating factor without guidance or limitation created the distinct possibility that racial prejudices, whether subtle or overt, influenced their decision to sentence Mr. Tuilaepa to death. The Georgia capital scheme denounced in *Furman* and Penal Code section 190.3(a) provide the same significant and impermissible "open invitation to discrimination." *Furman*, 408 U.S. at 365 (concurring opinion of Marshall, J.). Thus, Mr. Tuilaepa's death sentence violates the Eighth Amendment.

CONCLUSION

Amici respectfully submit that the instructions provided to the jury in this case failed to provide sufficient guidance as to what factors the jury should weigh in deciding whether to impose a death sentence and permitted those critical decisions to be influenced by constitutionally impermissible factors. Accordingly, the judgment of the California Supreme Court must be reversed.

January 24, 1994

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